Supreme Court
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No. 04-

IN THE

Supreme Court of the United States

DR. JACK KEVORKIAN,

Petitioner,

v.

MILLICENT WARREN, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF CERTIORARI IN ORDER TO REVIEW THE DENIAL OF HIS PETITION FOR WRIT OF HABEAS CORPUS RELIEF BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND SUBSEQUENT DENIAL OF RELIEF BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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OPINIONS BELOW

The order of the United States District Court for the Eastern District of Michigan (the "District Court") denying Petitioner, Dr. Jack Kevorkian's, Petition for Writ of Habeas Corpus by a Person in State Custody (the "Habeas Petition") from which Dr. Kevorkian seeks review was issued on September 29, 2003. Exh. 2[1]. The order of the Sixth Circuit Court of Appeals denying Dr. Kevorkian's request for a certificate of appealability ("COA") with respect to the District Court's denial of his Petition for Writ of Habeas Corpus from which Petitioner seeks review was issued on June 17, 2004. Exh. 1.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. The pertinent portions of these provisions are attached hereto as Exhibit 3.

STATEMENT OF THE CASE

Statement of Material Facts and Proceedings with Respect to State Court Case

In or around the fall of 1998, upon learning that he would be charged with a crime by the State of Michigan for committing an act protected by the Ninth and Fourteenth Amendments to the United States Constitution, Dr. Kevorkian retained attorney David Gorosh ("Gorosh") to serve as his lead defense trial counsel in connection with his impending prosecution by the State of Michigan for first degree murder, delivery of a controlled

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1. The exhibits referenced herein are attached as Addendum.

substance and assisting a suicide with respect to the death of Thomas Youk. Exh. 4 at 1.

Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan for approximately five years at the time, was asked by Gorosh to serve as co-counsel. *Id.* at 1. At the time, Gorosh had only three years of legal experience, and his trial experience was extremely limited. Exh. 5 at 1-2, 4-5. Gorosh had never defended a felony, much less a murder case. *Id.* at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that, when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. *Id.* at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. Exhs. 4 at 2; 5 at 2-5.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I - first degree murder, Count II - delivery of a controlled substance and Count III - assisting suicide.

These charges were brought against Dr. Kevorkian based upon a videotape that was aired on the television program "60 Minutes," which subsequently was admitted as an exhibit at the trial. Exh. 6 at 8-9. The videotape revealed that: (1) Thomas Youk suffered from Amyotrophic Lateral Sclerosis ("ALS"), a degenerative disease that caused him unbearable pain and suffering; (2) Thomas Youk had no control of his muscles and was terrified of choking; (3) Thomas Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his unbearable pain and suffering; and (4) in order to relieve Thomas Youk's unbearable pain and suffering, Dr. Kevorkian administered an injection to Thomas Youk, even though such

injection could hasten the time of death. *Id.* The Prosecution alleged that this act constituted murder in violation of Michigan Compiled Law ("MCL") 750.316, possession of a controlled substance in violation of MCL 333.7401(2)(b) and criminal assistance to suicide in violation of MCL 750.329a.

During the initial stages of the co-representation, Dwyer felt she would have input regarding defense strategies. Exh. 4 at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized that her recommendations would have no effect on Gorosh's decisions. *Id.*

The relationship between Dwyer and Gorosh deteriorated rapidly, and, by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. *Id.* at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian which Gorosh himself lacked. *Id.* at 1. Nevertheless, Gorosh's control over all aspects of the case remained unyielding. *Id.* at 1-2. Gorosh withheld vital information from Dwyer, made public comments without consulting Dwyer and made comments to the media against the express wishes of his client, Dr. Kevorkian. *Id.*; Exh. 7 at 1. In addition to ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. *Id.*

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. Exh. 4 at 1-2. Gorosh proceeded with this motion against the advice of co-counsel, Dwyer, as well as several experienced attorneys, and against the express wishes of his client, Dr. Kevorkian. Exhs. 4 at 1-2; 5 at 3-4; 7 at 1. Schwartz and Geoffrey Fieger, Esq. ("Fieger")[2], experienced

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2. Fieger and Schwartz had previously successfully defended Dr. Kevorkian against similar charges on a number of occasions.

criminal attorneys and Gorosh's former employers, strongly advised Gorosh *not* to seek dismissal of the assisted suicide charge. Exh. 4 at 1-4.

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide count. Exhs. 4 at 2; 5 at 3-4. At the motion hearing held on March 3, 1999, even Judge Jessica Cooper was baffled by Gorosh's decision. Exh. 8 at 12 (Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. *Id.* at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this court to dismiss the four-year felony [*i.e.*, the assisted suicide charge] and let him go to trial on murder in the first degree?" *Id.* at 12 (Court). The Court then questioned Gorosh about the prudence of his purported strategy, asking "What if they decide not to participate on assisted suicide at all and they just go for murder." *Id.* at 13. Gorosh replies, "What do you mean?" *Id.* (Gorosh). The Court continues, "What if they decide . . . that they're going to *nolle pros* the assisted suicide?" *Id.* (Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" *Id.* Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. *Id.* at 13-14 (Gorosh).

On March 12, 1999, the Prosecution did *nolle prosequi* the assisted suicide charge, as the Court had warned during the March 3, 1999 hearing. Exh. 9 at 3 (Skrzynski).

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense, *i.e.*, Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding other matters. Exh. 4 at 2. Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. *Id.* At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she

would not permit a hybrid defense. Exh. 10 at 12-14 (Court). According to Judge Cooper, Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. *Id.* At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. Exhs. 4 at 2; 11 at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including the examination of all witnesses, except the medical examiner. Exh. 4 at 2.

On the weekend immediately preceding Dr. Kevorkian's trial, Gorosh did little to prepare. *Id.* at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial, and instead spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. *Id.* Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. *Id.*; Exh. 7 at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. Exh. 4 at 3. At about 10:30 a.m., Gorosh and the other young attorney arrived. *Id.* at 3. Dr. Kevorkian immediately became distressed that this young attorney was present because he had explicitly instructed Gorosh not to bring him. *Id.*; Exhs. 6 at 2; 9 at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. Exhs. 4 at 3; 7 at 1.

Dr. Kevorkian told Gorosh that he would represent himself unless Dwyer could represent him at trial. Exhs. 4 at 3. Gorosh was adamant that Dwyer could not do so. *Id.* Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. *Id.* For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. *Id.*

Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. *Id.* Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. *Id.* In addition, Dwyer indicated that she felt awkward because Gorosh had asked her to assist as co-counsel. *Id.* Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh, whom he did not trust. *Id.*

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. *Id.* Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. *Id.*

Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. Exhs. 6 at 95-96, 101, 135, 137, 145 (Court); 12 at 10-12; 13 at 13, 25-26 (Court). In addition to his actions as advocate before trial, Gorosh continued to act as an advocate at times, as well as an advisor, for Dr. Kevorkian during trial. Exhs. 4 at 2; 6 at 95-96, 98 (Court).

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. Exhs. 4 at 4; 12 at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial. Exh. 12 at 268. Dr. Kevorkian understood his role to be that of a mouthpiece to present information prepared by his attorneys. Exhs. 6 at 137; 13 at 12-13, 25-26.

After it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh out of

frustration and desperation. Exh. 11 at 3-4. As the trial progressed, Gorosh became far more interested in making comments to the media than in defending his client. Exhs. 4 at 1-4; 7 at 1; 11 at 4. Gorosh's priorities became distorted, detrimentally affecting Dr. Kevorkian's defense and best interests. Exhs. 7 at 1; 11 at 4.

Furthermore, during the trial, Gorosh openly displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. Exhs. 4 at 4; 11 at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked and appeared to share the Trial Court's discomfort during difficult points, rather than assisting and supporting his client, Dr. Kevorkian. Exh. 4 at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. *Id.*; Exh. 7 at 1. Ruth Holmes, CDE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. Exh. 11 at 1. Holmes advised Gorosh that his behavior during trial would have a negative effect on the presentation of Dr. Kevorkian's defense. *Id.* at 4.

During the times that Gorosh acted as an advocate, as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial proceedings themselves, although Dr. Kevorkian sought and needed such advice. Exh. 7 at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. *Id.* Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. *Id.* As the trial progressed, Dr. Kevorkian developed further distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel.

Id. Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. *Id.*

Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments, which references blatantly violated Dr. Kevorkian's Fifth Amendment right not to testify. Exh. 4 at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion, involving an improper comment unrelated to Dr. Kevorkian's right not to testify. *Id.*; Exh. 14 at 65 (Dr. Kevorkian).

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and delivery of a controlled substance. The Michigan Department of Corrections ("MDC") recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court (the "Sentencing Report"). The Sentencing Report indicates that the facts and circumstances of this case are unusual inasmuch as Thomas Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. The Sentencing Report further states that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines.

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the MDC, the Trial Court did not deviate from the standard sentencing guidelines, and instead sentenced Dr. Kevorkian to ten to twenty-five years in prison on the second degree murder conviction, and three to seven years in prison for the delivery of a controlled substance.

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. The Motion for a New Trial was based on affidavits from, and conversations with, members of the defense team who explained the facts and circumstances of Gorosh's

representation of Dr. Kevorkian. Exhs. 4; 5; 7; 13. The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for an evidentiary hearing[3], without allowing argument, in an Opinion and Order dated July 15, 1999.

Dr. Kevorkian timely filed his Claim of Appeal in the Michigan Court of Appeals on August 23, 1999 raising several Constitutional issues. Dr. Kevorkian filed his Appellate Brief on November 11, 1999. Exh. 15.

On November 20, 2001, the Michigan Court of Appeals rejected Dr. Kevorkian's request for reversal and/or a new trial based upon the Constitutional arguments he asserted. *People v. Kevorkian*, 248 Mich. App. 373; 639 N.W.2d 291 (2001).

Dr. Kevorkian made timely application for leave to appeal the erroneous November 20, 2001 Order of the Michigan Court of Appeals to the Michigan Supreme Court (the "Application"). On April 9, 2002, the Michigan Supreme Court denied Dr. Kevorkian's Application. Exh. 16.

Statement of Material Facts and Proceedings with Respect to Habeas Petition

On July 17, 2002, Dr. Kevorkian filed his Habeas Petition in the District Court. Exh. 17. Therein, Dr. Kevorkian alleged that he was being deprived of his liberty by the State of Michigan in violation of the Constitution of the United States inasmuch as he was incarcerated by the State of Michigan in derogation of the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. *Id.*

On July 23, 2002, the District Court required the prosecution to file a response thereto. Exh. 18.

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3. Michigan law requires an evidentiary hearing, known as a "*Ginther* hearing," where the effectiveness of counsel is called into question. *See People* v. *Ginther*, 390 Mich. 436, 442-443; 212 N.W.2d 922 (1973).

On September 29, 2003, the District Court denied the Habeas Petition (the "September 29, 2003 Order"). Exh. 2.

On October 20, 2003, Dr. Kevorkian filed an application (the "Application for COA") with the District Court seeking a certificate of appealability ("COA") which is required pursuant to 28 U.S.C. § 2253(c) and FRAP 22(b) in order to permit Dr. Kevorkian to pursue an appellate review of the District Court's denial of his Habeas Petition. Exh. 19.

Also on October 20, 2003, Dr. Kevorkian timely filed a Notice of Appeal of the September 29, 2003 Order.

On November 3, 2003, the District Court denied Dr. Kevorkian's Application for COA. Exh. 20. As a result of the District Court's denial of the Application for COA, the Sixth Circuit Court of Appeals construed Dr. Kevorkian's Notice of Appeal as an application for COA pursuant to FRAP 22(b)(2).

On June 17, 2004, the Sixth Circuit refused to grant a COA to Dr. Kevorkian in an unsigned order[4]. Exh. 1. As a result, Dr. Kevorkian now seeks a writ of certiorari from this Honorable Court in order to review the erroneous decision of the District Court.

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4. Although habeas petitions are to be expedited, the District Court took over 14 months before ruling on Dr. Kevorkian's Habeas Petition. *See, e.g.*, 6 Cir. I.O.P. 22(c), 28(c); *Cf.*, Exhs. 1, 17. Notwithstanding that it took over 14 months to issue an opinion on Dr. Kevorkian's Habeas Petition, the District Court then denied Dr. Kevorkian's request for a COA in only 14 *days* on the purported ground that there were no issues upon which reasonable jurists could disagree. *Cf.*, Exhs. 19, 20. The Sixth Circuit then failed to address Dr. Kevorkian's request for a COA for over seven months, at which time it summarily dismissed Dr. Kevorkian's request for a COA without any reasoned opinion. *Cf.*, Exhs. 1, 20.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE GRANTED BECAUSE DR. KEVORKIAN'S FIFTH AMENDMENT RIGHT WAS VIOLATED.

The Prosecution violated Dr. Kevorkian's Constitutional rights when the Prosecutor made comments during the trial which were clearly of such a character that the jury would naturally and reasonably take them as a reference to his Constitutionally protected decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court, which probing analysis the Michigan Courts failed and refused to undertake. *Lent* v. *Wells*, 861 F.2d 972, 977 (6th Cir. 1988).

Specifically, during Dr. Kevorkian's closing argument, the Prosecutor made at least four comments, in a very short period of time, referring to Dr. Kevorkian's failure to testify. The Prosecutor said, "*He can't testify now. He can't tell the facts now.*" Exh. 14 at 50 (emphasis added). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury *which have not been proven before through testimony or other evidence. He cannot testify now.*" *Id.* at 53 (emphasis added). The Prosecutor continued to state "[the defendant] *could have gotten on — you know, he didn't.*" *Id.* at 54 (emphasis added). Although the Prosecutor did not use the word "stand" everyone in the courtroom, especially the jury, was able to fill in the blank with the word "stand" since that is the natural and expected conclusion of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't."

Finally, the Prosecutor went on to object saying, "*He's now testifying*. He's putting new facts before the jury. He can't do that." *Id.* (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "[Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" *Id.* at 32. This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's Constitutionally protected decision not to testify.

When viewed in context, the Prosecutor's remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified, although this is his Constitutional right. Because of the short period of time in which all the comments were made, the Prosecutor's message was crystal clear. Furthermore, these comments were made during closing argument, and were some of the last things jurors heard before retiring to deliberate. Simply put, it is reversible error to specifically refer to the failure of defendant to take the stand, and the clear precedent of this Court unequivocally recognizes this. *Griffin* v. *California*, 380 U.S. 609, 614 n.5 (1965).

Nonetheless, the District Court erroneously determined that Dr. Kevorkian's claim of violation of the Fifth Amendment by the Prosecutor was barred because there was no contemporaneous objection thereto. However, Dr. Kevorkian has asserted that there was no contemporaneous objection to the Prosecutor's egregious violations of Dr. Kevorkian's Fifth Amendment rights *because Dr. Kevorkian did not receive effective assistance of counsel*, as fully set forth below. Indeed, the District Court *conceded* that Dr. Kevorkian did move for mistrial based upon the Prosecutor's remarks only one day after the remarks were made. Exh. 1 at 28. Although the District Court further concluded that the Prosecutor's remarks did not violate Dr. Kevorkian's Fifth Amendment rights, the District Court acknowledged that the Michigan Trial Court did *not* give a

curative instruction at the time of the remarks and that the Prosecutor's remarks were all made during the isolated and relatively short period of Dr. Kevorkian's closing argument. *Id.* at 26-28, 31.

In *Griffin*, 380 U.S. at 614 n.5, this Court held that the prosecution may *not* comment on the accused's silence, expanding on the general rule set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. *Griffin*, 380 U.S. at 614. Permitting such comment by the prosecution amounts to an impermissible penalty imposed by courts on the exercise of a Constitutional privilege. *Id.* Whether a jury may draw a negative inference *on its own* from the accused's failure to testify is vastly different than the court solemnizing such silence into evidence against the accused, and such court action is prohibited by the Constitution. *Id.*

This Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer *no penalty* . . . for such silence." *Malloy*, 378 U.S. at 8 (emphasis added). *Accord Spevack* v. *Klein*, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of *any sanction* which makes assertion of the Fifth Amendment privilege costly." *Spevack*, 385 U.S. at 515 (citation omitted, emphasis added). This Court has cautioned that even the *slightest* encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed *liberally*. *Id.* at 515-16 (Constitutional provisions for the security of person and property should be liberally construed). *See also Coppola* v. *Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989) (the privilege against self-incrimination should be given liberal application).

In accord with this Court's holding in *Griffin*, *supra*, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or are they of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions were given and when. *Lent*, 861 F.2d at 975. The statements must be viewed in context, "not singled out and standing alone," and in the aggregate. *Id.* at 976. *Accord Berryman* v. *Colbert*, 387 F. Supp. 378, 380 (E.D. Mich. 1974).

If the reviewing court determines that there was error, it must then determine if the error was harmless. *Lent*, 861 F.2d at 975.

> Harmless error, in the context of the violation of a Constitutional Right of a defendant is an *extremely narrow* standard permitting the state to avoid retrial of a defendant only when it can *demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.*

Id. at 977, *citing Chapman* v. *California*, 386 U.S. 18 (1967) (emphasis added). This Court has held that the reviewing court must make a determination whether, absent the prosecutor's allusion to the accused's failure to testify, it is clear *beyond a reasonable doubt* that the jury would have returned a verdict of guilty. *United States* v. *Hastings*, 461 U.S. 499, 510-11 (1982). Indeed, in *Lent*, although the Sixth Circuit agreed the case was certainly strong enough to find the defendant guilty, it held that the state had still not demonstrated *beyond a reasonable doubt* that the Constitutional error was harmless, as required by this Court's holding in *Hastings*, *supra*. *Lent*, 861 F.2d at 977.

Although the Michigan Court of Appeals acknowledged the clear precedent affirming that *no comment* may be made with respect to a defendant's decision to assert his Constitutional right not to testify in its decision rejecting Dr. Kevorkian's claim that his Fifth Amendment rights were violation, it erroneously asserted, *without support*, that such precedent is inapplicable where a defendant proceeds *in propria persona*. No decision of this Court, or any Circuit Court of Appeals, has held that the Fifth Amendment right against self-incrimination is *in any way diminished* when a defendant chooses to exercise his Constitutional right to represent himself, and thus the Michigan Courts' refusal to apply the clear precedent of this Court to Dr. Kevorkian's case is unreasonable, and the District Court's refusal to grant Dr. Kevorkian's Habeas Petition was erroneous.

In any event, where a petitioner can show both cause for non-compliance with procedural requirements and actual prejudice resulting from the Constitutional error, there is no procedural default. *See Gravley* v. *Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996). In the case at bar, Dr. Keviorkian did not properly object to certain prejudicial and unconstitutional comments made by the Prosecutor in violation of Dr. Kevorkian's Fifth Amendment rights as a direct result of the ineffective assistance of Dr. Kevorkian's trial counsel, which ineffective assistance is also raised by Dr. Kevorkian in his Habeas Petition. Therefore, such claims are not be subject to procedural default. Furthermore, the Prosecutor's egregious comments so clearly violated Dr. Kevorkian's Fifth Amendment rights that they constitute *plain error* which prejudiced Dr. Kevorkian because, absent such comments, the outcome of the trial may have been different. Thus, even without a contemporaneous objection, such plain Constitutional error is subject to appellate review.

II. THIS PETITION SHOULD BE GRANTED BECAUSE DR. KEVORKIAN'S RIGHTS UNDER THE NINTH AND FOURTEENTH AMENDMENTS WERE VIOLATED.

As a threshold matter, the District Court erroneously determined that Dr. Kevorkian's claim of a violation of the Ninth Amendment was procedurally defaulted on the basis that such issue was purportedly not properly placed before the Michigan Court of Appeals. In fact, this issue was properly put before the Michigan Court of Appeals, but the Michigan Court of Appeals nonetheless deliberately and wrongfully ignored the issue. Specifically, Dr. Kevorkian clearly stated that his Constitutional claim is based upon *both* the Ninth and Fourteenth Amendments jointly[5]. *See*, Exh. 15 at 35-39. In fact, the Michigan Court of Appeals did render an opinion on the merits regarding Dr. Kevorkian's position under the Fourteenth Amendment which included intertwined aspects of the Ninth Amendment. *Kevorkian*, *supra*. Because Dr. Kevorkian's claim for relief in his Habeas Petition is premised upon the intertwined aspects of both the Ninth and Fourteenth Amendments, and the Michigan Court of Appeals did in fact address the merits of Dr. Kevorkian's position, there can be no procedural default because the Michigan Court of Appeals did rule upon such issue. *Id.*

Although the District Court determined that no violation of the Fourteenth Amendment had occurred on the basis that there is no constitutional right to commit euthanasia, Dr. Kevorkian never asserted a right to commit euthanasia as a basis for his appeal. Exhs. 15 at 37-42; *Kevorkian*, *supra*. Instead, Dr. Kevorkian expressly asserted only a right of the patient to be free from unbearable and irremediable pain and suffering, which right can be asserted by a treating physician

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5. The Michigan Court of Appeals erroneously refused to consider Dr. Kevorkian's position solely under the Ninth Amendment because Dr. Kevorkian purportedly abandoned such argument on appeal. *Kevorkian*, *supra*.

when the treating physician is accused of a crime as a result of his actions in aiding the patient in obtaining medical treatment for unbearable and irremediable pain and suffering, which treatment is constitutionally permitted. Exh. 15 at 37-41; *Washington* v. *Glucksburg*, 521 U.S. 702, 737 (O'Connor, J., concurring), 791-792 (Breyer, J., concurring) (1997). Indeed, the clear precedent of this Court approves of "aggressive palliative care," such as the care provided by Dr. Kevorkian. *Id.* at 745, 750-751 (Stevens, J., concurring).

III. THIS PETITION SHOULD BE GRANTED BECAUSE DR. KEVORKIAN'S SIXTH AMENDMENT RIGHT TO RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

The District Court erroneously determined that there was no violation of the Sixth Amendment because Dr. Kevorkian purportedly did receive effective assistance of counsel before his trial. The District Court nonetheless conceded that: (1) defense "counsel's strategy failed to benefit [Dr. Kevorkian]"; (2) defense counsel was "inexperienced;" and (3) defense counsel *failed to prepare a defense for Dr. Kevorkian*. Exh. 2 at 18-20.

Despite the District Court's assertion that Dr. Kevorkian merely presented conclusory statements regarding his claim of ineffective assistance of counsel, Dr. Kevorkian in fact presented substantial evidence demonstrating the ineffective assistance of his counsel both to the District Court and to the Michigan Court of Appeals. *See, e.g.*, Exhs. 15 at 13-27; 17 at 11-15.

A. *Gorosh Was Not Qualified to Handle the Defense of Dr. Kevorkian.*

Gorosh was simply not qualified to handle the defense of Dr. Kevorkian inasmuch as Dr. Kevorkian was charged with a serious criminal offense which carried a maximum penalty of imprisonment for life.

According to co-counsel, Dwyer, and Gorosh's former employer, Schwartz, Gorosh was not competent to handle the case, nor to prepare and aid Dr. Kevorkian in presenting his own defense. Exhs. 4 at 2, 4-5; 5 at 3-6. Gorosh had minimal experience inasmuch as he had only been practicing for three years. Exh. 5 at 1-2. He had limited trial experience, and had *never* defended a felony case, much less a homicide. *Id.*

The poor decisions and trial strategies implemented by Gorosh reveal his inexperience and inability to grasp important strategic considerations. For example, despite the advice of co-counsel, Dwyer, Gorosh moved to quash the assisted suicide count. Exhs. 4 at 2; 11 at ¶ 6. While the Michigan Court of Appeals dismissed this claim as without merit because the Prosecution ultimately dismissed the assisted suicide charge on its own motion and Gorosh "had no influence over the prosecutor's decision to take this action," the motion to quash the assisted suicide count (which the Prosecution opposed) was precisely what brought this issue to the Prosecutor's attention. Exh. 4 at ¶¶ 19-22. The Prosecution had in fact argued to *retain* the assisted suicide charge until Gorosh's decision to bring the ill-founded Motion to Quash caused the consequences of retaining such charge to become clear to the Prosecution. Exh. 8 at 15-19. Indeed, Judge Cooper explicitly told Gorosh that eliminating the assisted suicide count would lead to the exclusion of testimony about the suffering of Thomas Youk's family and about Thomas Youk's medical condition, and Judge Cooper was baffled by Gorosh's "strategy" to challenge the assisted suicide count in lieu of the murder count. Exh. 10 at 12-13 (Court).

B. *Gorosh Prepared No Defense Whatsoever for His Client.*

During the time Gorosh was acting as advocate for Dr. Kevorkian, he *prepared no defense whatever* for his client, which can not possibly be considered competent representation under any definition. Exhs. 3 at ¶¶ 15-16, 23-24; 4 at ¶ 23; 9. In fact,

Gorosh did not even challenge the cause of death of Thomas Youk, although there was significant evidence to support raising this defense due to Thomas Youk's advanced stage of ALS, a fatal disease. ALS was listed as a significant contributing factor on the amended death certificate, and Thomas Youk may very well have passed away prior to any actions of Dr. Kevorkian when Thomas Youk gasped, as clearly revealed on the videotape. Exhs. 6 at 75-78, 90-91 (Dragovic); 14 at 63 (Skrzynski).

C. *Gorosh Failed to Properly Support Dr. Kevorkian's Defense By Providing the Legal and Factual Bases for the Admission of Crucial Defense Testimony.*

Dr. Kevorkian was deprived of presenting favorable testimony because Gorosh did not properly prepare legal and factual reasons to present to the Trial Court as to why such testimony should be permitted, even though Gorosh was clearly acting as advocate for Dr. Kevorkian in connection with this issue. Exh. 6 at 122. Specifically, Gorosh failed to instruct Dr. Kevorkian on the appropriate legal basis for calling certain crucial defense witnesses. *Id.* As a result, the Trial Court erroneously refused to allow the testimony of Terry and Melody Youk (the "Youks"), the brother and wife of Thomas Youk. *Id.* The failure to call witnesses can constitute ineffective assistance of counsel where, as here, it deprives the defendant of a substantial defense. *People* v. *Walker*, Mich. Ct. of Appeals Case No. 233494 (January 3, 2003) (per curiam), *citing People* v. *Daniel*, 207 Mich. App. 47, 58; 523 N.W.2d 830 (1989). A "substantial defense" is one that *might* have made a difference in the outcome of the trial. *Id.*

It is undisputed that the Youks were *res gestae* witnesses to the incident at bar. The Youks were listed on the Waterford Police Witness List. Persons present at the scene of a "crime" are *presumed* to be *res gestae* witnesses able to testify regarding their observations. *People* v. *Brooks*, 96 Mich. App. 96, 98; 292 N.W.2d 139 (1980) (per curiam). The Prosecutor also

included the Youks as *res gestae* witnesses on Count II (delivery of a controlled substance) of the First Amended General Information (the "Information"). The Prosecutor even made reference to a telephone call Terry Youk made to Dr. Kevorkian on behalf of his brother, Thomas Youk. Exh. 14 at 31. Because the Prosecutor contends that both Counts I and II arise from the *same act* (the injection of a controlled substance into Thomas Youk which supposedly caused his death), the same *res gestae* witnesses must necessarily be allowed to testify as to both counts.

Under well-established Michigan law,

> [a] *res gestae* witness is an eyewitness to *some event in the continuum of a criminal transaction* whose testimony would aid in the full disclosure of the facts surrounding the alleged commission of an offense. *The witnesses need not be an eyewitness to the actual crime. People* v. *Johnson*, 164 Mich.App. 634, 644 at n.3; 418 N.W.2d 117 (1987) (emphasis added), *citing*, *People* v. *Baskin*, 145 Mich.App. 526, 530-531; 378 N.W.2d 535 (1985) (per curiam)[6]. *Accord*, *People* v. *Austin*, 95 Mich.App. 662, 674-675; 291 N.W.2d 160 (1980).

A *res gestae* witness is one whose testimony is necessary to illuminate an important area of the case. *People* v. *Johnston*, 76 Mich. App. 332, 337, 256 N.W.2d 782 (1977). Because all relevant evidence is admissible, and a *res gestae* witness, *by definition*, can provide testimony which illuminates an important area of the case, a defendant *must* be permitted to call all *res gestae* witnesses he wishes because the testimony of *res gestae*

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6. Although the Michigan *res gestae* witness statute has been amended and no longer requires that the prosecutor produce all *res gestae* witnesses, prior case law explaining the bases for the *res gestae* witness rule remains good law, and continues to be relied upon by the Michigan Courts. *See, e.g., People* v. *Bieri*, Mich. Ct. of Appeals Case No. 206707 (May 9, 2000) (per curiam) (unpublished).

witnesses is *a priori* relevant. *Id.*; Michigan Rule of Evidence ("MRE") 402.

Furthermore, the purpose of the testimony of *res gestae* witnesses is to protect the rights of the accused. *Res gestae* witnesses must be permitted to testify because they can present the *entire* transaction to the trier of fact, *protect the accused from false accusations* and *protect the accused from the suppression of testimony favorable to him. People* v. *Hernandez*, 84 Mich. App. 1, 13, 269 N.W.2d 322 (1978); *People* v. *Szymanski*, 52 Mich. App. 605, 610, 218 N.W.2d 95 (1974); *People* v. *Hicks*, 63 Mich. App. 595, 597, 234 N.W.2d 720 (1975). In addition, a person need not be present at the scene of the crime to be a *res gestae* witness, so long as his or her testimony would assist in developing a *full disclosure of the facts and circumstances* surrounding the alleged crime. *People* v. *Reynolds*, 93 Mich. App. 516, 521, 286 N.W.2d 898 (1980); *Baskin*, 145 Mich. App. at 531. The *res gestae* witness rule encompasses not only eyewitnesses, but *all witnesses* whose testimony may aid in the making of a *fair presentation of the res gestae of the crime charged. Baskin*, 145 Mich. App. at 530-31, 535. *Every reasonable doubt as to whether a witness is a res gestae witness should be resolved in favor of indorsing and calling the witness. Austin*, 95 Mich. App. at 674; *People* v. *Doyan*, 116 Mich. App. 356, 363, 323 N.W.2d 397 (1982). Simply put, under Michigan law, Dr. Kevorkian had an absolute right to call in his defense all *res gestae* witnesses, including the Youks[7].

Even if the *res gestae* witnesses whom Dr. Kevorkian wished to call could have been excluded, which they could not for the reasons set forth above, the Youks' testimony should have been admitted for other reasons as well, and Gorosh's

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7. The record shows that the offer of Proof for Terry Youk would be the same as that offered for Melody Youk. Exh. 6 at 6 (Dr. Kevorkian).

failure to raise these issues likewise amounts to ineffective assistance.

For instance, the Youks' testimony was relevant as to Thomas Youk's cause of death. Gorosh could and should have challenged the cause of death because there was evidence introduced which raised the issue, and Thomas Youk suffered from a fatal disease, the effects of which could have caused death at any time. Exh. 6 at 90-91. The Youks were personally aware of the physical condition of Thomas Youk, the progression of his ALS and Thomas Youk's various potentially fatal symptoms resulting from the ALS. As Thomas Youk's closest family members, Terry and Melody Youk were aware that Thomas Youk was near death, and, sadly, could have passed away at any moment. *Id.* at 122 (Melody Youk). The Youks knew this from their *personal observation* of Thomas Youk, as well as direct communications with Thomas Youk's physicians and hospice caregivers. *Id.* While the Prosecutor claimed there was no evidence that Thomas Youk was afraid of choking, despite Dr. Kevorkian's statements in the "60 Minutes" videotape, Melody and Terry Youk would have testified that Thomas Youk was in fact very afraid of choking *at all times*. Exh. 14 at 37-38.

Even the Trial Court recognized that challenging the cause of death would be an appropriate defense. Exh. 10 at 33 (Court). Gorosh indicated he might challenge the cause of death, but then failed to do so, and failed to advise Dr. Kevorkian to do so, even though this is a *fundamental* defense strategy in a murder trial inasmuch as the requirement that the accused caused the death of the decedent is a requisite element of murder. *Id.* at 21-23 (Gorosh). The Youks' testimony as to Thomas Youk's deteriorating medical condition would have been relevant to this defense.

In addition, the Prosecutor argued throughout the trial that the purpose behind Dr. Kevorkian's making the videotape was

for publicity and to advance his own personal agenda. Exhs. 14 at 29-30, 41-42, 45 (Skrzynski). The Prosecutor made numerous unsupported statements and implications about Dr. Kevorkian's motives, and his "insensitivity" to Thomas Youk. Exh. 14 at 25-26, 29-32, 34-39, 41, 45, 63-65 (Skrzynski). The Youks would have contradicted this, testified to Dr. Kevorkian's *sensitivity*, and testified that Dr. Kevorkian's actual purpose in making the videotape was to show the consent of Thomas Youk to receive the treatment of Dr. Kevorkian as protection from possible prosecution. Exh. 6 at 122.

Furthermore, the Prosecution argued lack of consent, although Dr. Kevorkian was precluded from introducing any evidence as to Thomas Youk's consent through the testimony of the Youks. Exh. 14 at 26, 29-30, 64-65 (Skrzynski). The Youks would have testified that Thomas Youk was not a victim, and that Dr. Kevorkian could have sought to advance his personal agenda through Thomas Youk inasmuch as it was *Thomas Youk who sought out Dr. Kevorkian* in an effort to alleviate his unbearable pain and suffering. Exh. 6 at 122 (Melody Youk). Such testimony was admissible as an exception to the hearsay rule as a then-existing mental, emotional or physical condition under MRE 803(3). Dr. Kevorkian was precluded from presenting this evidence in his defense, while the Prosecutor was permitted to raise these issues without contradiction.

In fact, Melody Youk should have been allowed to testify as to the contents of any conversation she heard between Thomas Youk and Dr. Kevorkian. Exh. 6 at 122 (Melody Youk). It is elementary that such conversations are exceptions to the hearsay rule as statements made for the purposes of obtaining medical treatment or diagnosis. MRE 803(4). Melody Youk explicitly stated in her offer of proof that she, Thomas Youk and Dr. Kevorkian discussed what services Dr. Kevorkian could render for Thomas Youk *as a physician*. Exh. 6 at 122 (Melody Youk). Likewise, any comment Thomas Youk made in Melody Youk's

presence about his physical condition is admissible under this same rule. MRE 803(3). In fact, any statement made by Thomas Youk is also admissible as an exception to the hearsay rule as a statement under belief of impending death inasmuch as Thomas Youk was suffering from the final stages of a fatal disease. MRE 804(b)(2); Exh. 6 at 75-78, 90-91 (Dragovic). Such a statement is admissible in a homicide prosecution, and Thomas Youk certainly believed his death was imminent[8]. *Id.*

Finally, Melody Youk could have rebutted numerous statements made by the Prosecution. For instance, the Prosecution claimed Dr. Kevorkian brought "a pretty large piece of equipment." Exh. 14 at 31 (Skrzynski). Melody Youk saw this piece of equipment firsthand. Exh. 6 at 122. The Prosecution implied some sinister purpose behind the fact that Dr. Kevorkian turned off the videotape stating, "[Dr. Kevorkian] turns off the videotape . . . and we don't know . . . what Dr. Kevorkian is doing in the meantime." Exh. 14 at 32-33. Melody Youk could have explained the reasons Dr. Kevorkian turned off the videotape, and what did go on in the meantime, because *she was there*. Exh. 6 at 122. The Prosecution claimed that Thomas Youk gasped and attempted to say something after Dr. Kevorkian administered the sedative. Exh. 14 at 63. The Prosecution suggested that Thomas Youk said "Wait." *Id.* However, it is just as likely that this sound was common for Thomas Youk due to his illness, or that it represented Thomas Youk's death throes *from ALS* and had nothing to do with Dr. Kevorkian's actions. Melody Youk would have shed light on these issues because she was familiar with the sounds made by Thomas Youk resulting from his illness and otherwise.

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8. To the extent there was a dispute as to this point, the testimony of the Youks would have confirmed this position.

D. *Gorosh Failed to Make Appropriate, Obvious and Necessary Legal Objections on Behalf of Dr. Kevorkian*

Gorosh did not even interject or instruct Dr. Kevorkian to make appropriate objections during trial, even though he was required by the Trial Court to sit at counsel table for this very purpose and his co-counsel, Dwyer, admonished him to make such objections. *See, e.g.*, Exhs. 4 at 4-5; 12 at 8-15; 13 at 25-26. Gorosh sat idly by as inappropriate and highly prejudicial comments were made in the presence of the jury, including impermissible and prejudicial comments regarding Dr. Kevorkian's constitutional right not to testify, knowing full well that Dr. Kevorkian did not have the legal training, knowledge or understanding to make these objections on his own. *See, e.g.*, Exh. 15 at 50-54. The Sixth Circuit has made clear that the failure of a defendant's counsel to object to substantial improprieties[9] committed by the prosecutor amounts to conduct far below the *Strickland* standard for effective assistance of counsel. *Washington* v. *Hofbauer*, 228 F.3d 689, 702 (6th Cir. 2000). The Sixth Circuit further found that such comments by a prosecutor amount to unfair and prejudicial misconduct which *requires* an objection. *Id.* at 703. The Sixth Circuit determined that the defendant's counsel's failure to object to such statements by the prosecutor constitutes "incompetence and *ignorance of the law*" rather than any plausible trial strategy. *Id.* (emphasis added). The Court further ruled that such a performance can not be deemed "objectively reasonable" because such a characterization would eviscerate the *Strickland* standard, rendering it nothing more than a "generous apology for the clearest of errors." *Id.* at 705.

9. Specifically, the Sixth Circuit identified the prosecutor's recitation of the bad character of defendant during closing, the prosecutor's argument that the crime alleged somehow "fit" the evidence of defendant's bad character, and the prosecutor's argument that the victim's account of the crime had been consistent over time, though there was no evidence in the record to support such an assertion, were all improper.

E. *Gorosh Failed to Object to the Prosecutor's Leading Questions During Direct Examinations, as well as other Blatant Prejudicial Actions by the Prosecutor.*

The Prosecution was able to conduct direct examination of witnesses through leading questions, and to make prejudicial and inappropriate statements to the jury, including, but not limited to, statements regarding Dr. Kevorkian's decision not to testify (as fully set forth above), statements regarding the penalty phase of the proceedings and statements regarding issues that had been stricken from the case, such as intent and consent. *See, e.g.*, Exh. 14 at 26, 29-30, 36-37, 39, 42, 63, 65-67. Because Gorosh failed to object, or to advise Dr. Kevorkian, a layman, to do so, Dr. Kevorkian was deprived of a fair trial.

F. *Gorosh's Behavior During Trial Served to Harm Dr. Kevorkian's Defense.*

Gorosh's behavior in the courtroom was totally inappropriate. Pursuant to the Michigan Rules of Professional Conduct, a lawyer has a duty, in accord with his role as an advocate, to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRPC 1.3, *comment*; MRPC 1.0, *comment*. Gorosh's behavior at counsel table not only was injurious and prejudicial to his client because of the negative impact it may have had on the jury, but it was also undignified and discourteous. Exhs. 4 at 4; 11 at ¶¶ 8, 9. It was wholly inappropriate for Gorosh to make gestures, roll his eyes or sigh while Dr. Kevorkian was presenting his case. *Id.*

G. *Gorosh Allowed His Relationship with Dr. Kevorkian to Deteriorate Beyond Repair, But Nevertheless Refused to Withdraw as Counsel.*

Gorosh allowed his relationship with Dr. Kevorkian to deteriorate to such a point that it was impossible for Gorosh to provide effective assistance. Gorosh's conversations with Dr. Kevorkian were reduced to shouting matches prior to trial.

Exh. 4 at 3. Gorosh refused to allow Dr. Kevorkian to have the counsel of his choice inasmuch as Gorosh indicated that Dwyer could not conduct the trial, despite Dr. Kevorkian's wish that she do so. *Id.* Furthermore, despite Dr. Kevorkian's specific instructions that another young lawyer was not to be part of the legal team, Gorosh continued to keep the other lawyer present. Exhs. 4 at 3; 11 at 3.

In addition, Gorosh did not maintain adequate communication with Dr. Kevorkian as required by MRPC 1.0 and 1.4(a). Although Gorosh met with Dr. Kevorkian from time to time to discuss the case, he merely falsely assured Dr. Kevorkian that everything was being handled, though clearly it was not. Exh. 11 at ¶ 4. Gorosh did not respond to Dr. Kevorkian's requests for information despite Dr. Kevorkian's repeated inquiries, and never even showed Dr. Kevorkian a complete witness list. Exh. 4 at 1.

Notwithstanding the foregoing, the District Court erroneously concluded that there was no violation of Dr. Kevorkian's Sixth Amendment right to counsel because Dr. Kevorkian purportedly "knowingly and intelligently" waived his right to counsel during his state trial, and had no right to a hybrid defense whereby he and his counsel shared duties during the trial. The District Court nonetheless acknowledged, and it is undisputed, that standby counsel were in fact present for "consultation and advice" during the state court trial. Exh. 2 at 23. Although the District Court further acknowledged that this Court has "not yet directly answered" the question of whether a defendant is "entitled to effective assistance of standby counsel," the District Court nonetheless determined that there is no such right based largely upon unpublished decisions. *Id.* at 24.

In any event, it is clear that under Michigan law and the United States Constitution that Dr. Kevorkian could not have knowingly and intelligently waived his right to counsel. Ignoring its own precedent, the holdings of this Court and the Sixth

Amendment to the United States Constitution, the Michigan Court of Appeals somehow erroneously determined that Dr. Kevorkian had waived his right to counsel. Subsequently, the District Court held that the determination of the Michigan Court of Appeals did not serve to deprive Dr. Kevorkian of his constitutional right.

Tellingly, in an opinion issued less than three months before its decision in the instant matter, the Michigan Court of Appeals expressly held that a waiver of the right to counsel can *not* be unequivocal where standby counsel is present. *People* v. *Favors*, Mich. Ct. of Appeals No. 215826 (August 28, 2001) (per curiam). Thus, according to the Michigan Court of Appeals' own reasoning in *Favors*, Dr. Kevorkian's purported waiver *could not* have been effective as to all aspects of representation, because, even as he supposedly waived his right to counsel, *he undeniably continued to have counsel to assist him, with the Trial Court's approval*[10]. *Id.*; Exh. 2 at 23.

In an even more recent Michigan Court of Appeals' opinion, *People* v. *Johnson*, Mich. Ct. of Appeals Case No. 231517 (September 27, 2002) (per curiam), the Michigan Court of Appeals buttressed and re-confirmed its prior opinion in *Favors*, *supra*.

In *Johnson*, *supra*, the Michigan Court of Appeals held:

> Defendant's request for self-representation in the instant case was unequivocal and the trial court properly offered him the opportunity to consult with appointed counsel. However, *the presence of standby counsel alone does not legitimize a waiver of counsel*

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10. Thus, any comments made by Dr. Kevorkian prior to trial are irrelevant. Furthermore, any comments regarding self-representation made by Dr. Kevorkian during trial are also irrelevant to the instant analysis because the facts bear out that, whatever may have been said, Dr. Kevorkian in fact had counsel representing him in some capacity during the trial, and such representation was Constitutionally deficient.

> *inquiry*. Indeed, a further review of the record reveals that *the trial court failed to apprise defendant of the dangers of self-representation or determine if he knowingly, voluntarily, and intelligently waived his right to counsel*. We further note that *the trial court neglected to advise defendant of the charges before him and the maximum penalties for those offenses as required by the court rule. The fact that defendant was capable of filing motions and articulating his arguments during the trial neither proves that he was aware of the dangers inherent with self-representation, nor does it excuse the trial court's duty to comply with the standards set forth by the court rules and our Supreme Court. On this record, we find the trial court's "inquiry" into defendant's request to represent himself insufficient to establish a valid waiver of his right to counsel.*
>
> Because the trial court failed to substantively comply with the requirements of [*People* v.] *Anderson*, [398 Mich. 361; 247 N.W.2d 857 (1976)] and MCR 6.005(D), defendant's waiver of his right to counsel was *ineffective. Denial of the right to counsel is a structural error that requires automatic reversal.* (emphasis added, citations omitted).

Furthermore, the Michigan Supreme Court recently held that an indication that a defendant is unhappy with his current counsel, but nonetheless does not wish to proceed *pro se*, can not serve as a waiver of a defendant's right to counsel. *See People* v. *Russell*, Mich. Sup. Ct. Case No. 122998 (July 27, 2004).

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant the instant Petition.

Respectfully submitted,

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APPENDIX

APPENDIX 1 — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 17, 2004

No. 03-2356

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK KEVORKIAN,

Petitioner-Appellant,

v.

MILLICENT WARREN, Warden,

Respondent-Appellee.

ORDER

Jack Kevorkian appeals a district court judgment that denied his habeas corpus petition filed under 28 U.S.C. § 2254. The receipt of his timely appeal has been construed as an application for a certificate of appealability ("COA") under Fed. R. App. P. 22(b).

To obtain a COA, Kevorkian must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). An independent review of the record indicates that Kevorkian has not met this burden

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because his claims are all lacking in substantive merit and/ or defeated by an unexcused procedural default.

Accordingly, the COA application is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

APPENDIX 2 — OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS DATED SEPTEMBER 29, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 02-CV-7292-DT
HONORABLE NANCY G. EDMUNDS

JACK KEVORKIAN,

Petitioner,

v.

MILLICENT WARREN,

Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Jack Kevorkian ("Petitioner"), a state prisoner currently confined at the Thumb Correctional Facility in Lapeer, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that he is being held in violation of his constitutional rights. Petitioner was convicted of second-degree murder and delivery of a controlled substance following a jury trial in the Oakland County Circuit Court in 1999 and was sentenced to concurrent terms of 10 to 25 years imprisonment and seven years imprisonment on those convictions. In his pleadings, Petitioner raises claims concerning his due process rights under the Ninth and Fourteenth Amendments, his Sixth

Amendment right to the effective assistance of counsel, and his Fifth Amendment right against self-incrimination. For the reasons stated below, the petition for a writ of habeas corpus is denied.

I. Factual Background

Petitioner's convictions stem from his participation in the death of Thomas Youk, a 52-year-old former race car driver who suffered from amyotrophic lateral sclerosis ("ALS"), by lethal injection at Youk's home in Waterford, Michigan in September, 1998. The Michigan Court of Appeals described the underlying facts, which are presumed correct on habeas review, *see Monroe v. Smith*, 197 F. Supp. 2d 753, 758 (E.D. Mich. 2001), *aff'd.* 41 Fed. Appx. 730 (6th Cir. 2002), as follows:

> II. The Death Of Thomas Youk
>
> A. The September 15, 1998, Videotape
>
> On September 15, 1998, at 9:55 p.m., defendant went to Youk's home to discuss Youk's condition. As the videotape of this discussion revealed, defendant stated that he was recording their interaction in "connection with a request from Thomas [Youk] for help in . . . ending his suffering." Youk then described his condition. He recalled that his symptoms of ALS first became obvious to him in 1994 and that he had been confined to a wheelchair since 1997. By September 1998, Youk said, he could not move his left arm or his legs, he had minimal use of his right arm, he had difficulty swallowing and breathing, he was fed through a tube; and he was

forced to use a machine to help him breathe. Youk stated that, at the time, he could not do anything for himself, that he had discussed "his wishes" with his mother, brothers, and wife, and that they "understand why. It's my decision."

Defendant then told Youk that he needed to sign a form indicating that he was consenting to a "direct injection instead of using the device, the machine." Defendant asked Youk if he wished to donate his organs, and Youk declined. Defendant then read the consent form, which stated in part:

> I, Thomas Youk, the undersigned, entirely voluntarily, without any reservation, external persuasion, pressure, or duress; and after prolonged and thorough deliberation, hereby consent to the following medical procedure of my own choosing, and that you have chosen direct injection, or what they call active euthanasia, to be administered by a competent medical professional, in order to end with certainty my intolerable and hopelessly incurable suffering. The meeting ended at 10:15 p.m.

B. The September 16, 1998, Videotape

On September 16, 1998, at 9:49 p.m., defendant again videotaped himself and Youk at Youk's home. Youk stated that he "wanted to go through with this" and signed the consent form. Defendant remarked that he would inject Youk in the vein because "it's quicker," and stated, "now I'm going to put on a cardiogram so we know when your heart is stopped, okay." Defendant established a

connection between Youk and the electrocardiogram. Defendant injected Youk with Anectine and Seconal before injecting Youk with potassium chloride. During this time, defendant provided a commentary on what was occurring:

> Sleepy Tom? Tom are you asleep? And now we'll inject the Anectine. You asleep Tom? Tom? You asleep? He's asleep. Now the Potassium Chloride. This machine is recording for some reason so I'm pulling it by hand until the heart stops. It's been, it's been about two minutes since I injected the, ah, seconal, and one minute since I injected the--. Now we're getting agonal complexes and that's about the, the Potassium Chloride will stop the heart, so. Now there's a straight line. A straight line and the cardiogram will be turned off. His heart is stopped.

C. Cause Of Death

The police were dispatched to Youk's house on September 17, 1998, at 1:30 a.m. They found Youk lying on his bed, dead. The police also found a Federal Express receipt with defendant's name at the scene. Officials conducted Youk's autopsy at 10:00 a.m. the same day. The medical examiner listed the manner of death as homicide and the cause of death as intravenous injection of substances. During the autopsy, the medical examiner found two "fresh" needle marks on

Youk's left arid right wrists that had been covered with makeup. The autopsy protocol stated that the cause of death was "poisoning by intravenous injection of substances."

Oakland County Medical Examiner Ljubisa J. Dragovic, an expert in neuropathology and pathology who later testified for the prosecution at defendant's trial, witnessed the autopsy. Dr. Dragovic found three significant drugs in Youk's bodily fluids. First, Youk had a high level of the barbiturate Seconal, also known as Secobarbital, in his blood. Seconal is a Schedule 2 controlled substance[4] typically used to induce sleep. Dr. Dragovic believed that the amount of Seconal in Youk's blood would have killed him in a few hours. Second, Dr. Dragovic found Anectine, a paralyzing muscle relaxant, present in Youk's body in an amount that could have killed Youk within five to eight minutes by causing brain death. However, Dr. Dragovic determined that it was the third drug, potassium chloride, that defendant injected into Youk that caused his death. As Dr. Dragovic explained, when potassium chloride is injected into the body in a concentrated form at once, rather than in small amounts over time, it stops the heart from beating within a matter of seconds. According to Dr. Dragovic, the toxicology reports did not reveal the presence of potassium chloride in Youk's body because that substance is naturally present in the body after red blood cells die.

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4. Dr. Dragovic explained that the Board of Pharmacy and the Federal Drug Enforcement Agency must license a physician to prescribe Seconal.

Dr. Dragovic also confirmed that Youk had ALS. However, in Dr. Dragovic's opinion, Youk did not die from ALS, ALS was not an underlying cause of Youk's death, and ALS did not contribute to Youk's death in any way. Rather, Dr. Dragovic firmly reiterated that the poisons injected into Youk killed him, constituting a homicide.

D. The 60 Minutes Interview

News correspondent Mike Wallace interviewed defendant for 60 Minutes. In the first clip from the interview shown to the jury, Wallace stated at the outset, "You killed him." Defendant responded: "I did, but it could be Manslaughter not Murder. It's not necessarily Murder. But it doesn't bother me what you call it. I know what it is. This could never be a crime in any society which deems itself enlightened." Defendant indicated that he was making an example of Youk. Wallace then suggested that Youk was initially a little reluctant because Youk "thought he was getting assisted suicide." Defendant replied that "this is better than assisted suicide, I explained that to him. It's better control."

Defendant also explained to Wallace the process leading to Youk's death. According to defendant, the first injection paralyzed Youk's muscles and slowed his ability to take in oxygen. When the oxygen was "cut off' and Youk could not breathe, defendant injected the "potassium chloride to stop the heart." Defendant then told Wallace that "[e]ither they go or I go," apparently meaning that

> he would be acquitted for killing Youk or, if convicted, he would starve to death in prison: As defendant put it: "I've got to force them to act. They must charge me. Because if they do not, that means they don't think it's a crime. Because they don't need any more evidence do they? Do you have to dust for fingerprints on this[?]"
>
> Wallace suggested that defendant was "engaged in a political, medical, macabre . . . publicity venture," and had a "ghoulish . . . desire to see the deed done." Defendant did not disagree with those assertions, stating: "Well, it could be, I, I can't argue with that. Maybe it is ghoulish. I don't know. It appears that way to you. I can't criticize you for that." In fact, defendant agreed with Wallace, emphasizing that "the main point is . . . that the deed be done." Evidently in response to the argument that legalizing euthanasia could be problematic in practice, defendant commented that "[e]verything can be abused. You learn from abuse, you punish the abuser, and then . . . if you want to control, you say that only certain doctors can do this in certain areas, nobody else. . . . That's the way to control it."

Defendant then returned to one of his main themes, saying:

> If you don't have liberty and self-determination, you got nothing. That's what this country's built on and this is the ultimate self-determination to determine when and how you're gonna die when you're suffering.

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> [Wallace]: And those who say that [defendant], Dr. Death, is a fanatic? [Defendant]: Zealot. No, not if, sure, you try to take a liberty away and I turn fanatic. . . . I'm fighting for me, Mike, me. This is a right I want when I, I'm 71, I'll be 71. You don't know what'll happen when you get older. I may end up terribly suffering. I want some colleague to be free to come and help me when I say the time has come. That's why I'm fighting, for me. Now that sounds selfish. And if it helps everybody else, so be it.

People v. Kevorkian, 248 Mich. App. 373, 377-82, 639 N.W.2d 291 (2001).

Further facts are discussed within the body of this opinion as they relate to each of Petitioner's habeas claims.

II. Procedural History

Following his convictions and sentencing, Petitioner filed a motion for new trial with the trial court, which was denied on July 15, 1999. Petitioner also filed an appeal as of right with the Michigan Court of Appeals raising several claims of error, including those that form the basis for the instant petition. The Michigan Court of Appeals affirmed Petitioner's convictions. *People v. Kevorkian*, 248 Mich. App. 373, 639 N.W.2d 291 (2001). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. Kevorkian*, 465 Mich. 973, 642 N.W.2d 681 (2002). Petitioner then filed a petition for a writ of

certiorari with the United States Supreme Court, which was denied. *Kevorkian v. Michigan*, 537 U.S. 881 (2002).[1]

Petitioner, through counsel, has filed the present petition asserting that he is entitled to habeas relief because his convictions violate the Ninth and Fourteenth Amendments to the United States Constitution, because he was denied the effective assistance of pre-trial and standby counsel in violation of the Sixth Amendment, and because the prosecutor violated his Fifth Amendment rights by commenting on his decision not to testify at trial. Respondent has filed an answer to the petition asserting that Petitioner's habeas claims are barred by procedural default and/or lack merit. Petitioner has filed a reply, as well as a supplemental and amended reply, to that answer.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified 28 U.S.C. § 2241 *et seq.*, govern this case because Petitioner filed his habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

---

1. Petitioner also instituted actions in state and federal court concerning the issue of his release on bond pending appeal. Those proceedings are not pertinent to this case.

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d) (1996).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court undertook a detailed analysis of the correct standard of review under the AEDPA. According to the Court:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may

> grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13 (O'Connor, J., delivering the opinion of the Court on this issue).

In evaluating a state court decision under the "unreasonable application" clause, the Supreme Court further stated that a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 411. "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

The Supreme Court also clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," refers to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Id.* at 412. In determining what constitutes clearly established federal law, therefore, a federal habeas court must look to pertinent United States Supreme Court precedent.

Lastly, § 2254(e)(1) requires that this Court presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

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IV. Analysis

A. *Ninth and Fourteenth Amendment Claims*

Petitioner first claims that he is entitled to habeas relief because his convictions violate his constitutional rights under the Ninth and Fourteenth Amendments. The Michigan Court of Appeals set forth the relevant facts as follows:

> Before trial, defendant, relying on the Ninth Amendment, filed a motion asking the trial court to dismiss the charges against him. Evidently, defendant intended to argue that the people had retained the right to active euthanasia. The trial court denied the motion on the grounds that it was untimely and that defendant had failed to cite any support for his argument. Defendant then filed an emergency application for leave to appeal the trial court's order with [the Court of Appeals]. In addition to challenging the trial court's ruling, he also claimed that the prosecution violated the Michigan constitutional counterpart to the Ninth Amendment. [The Court of Appeals] ultimately determined that defendant failed to articulate the need for immediate appellate review.

Kevorkian, 248 Mich. App. at 382 (footnotes omitted).

1. *Ninth Amendment*

Petitioner asserts that the people have reserved the right to euthanasia under the Ninth Amendment to the United States Constitution and that his convictions violate that right. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to

deny or disparage others retained by the people." U.S. CONST. amend. IX. Respondent contends that this claim is barred by procedural default and is otherwise without merit.

Habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Couch v. Jabe*, 951 F.2d 94 (6th Cir. 1991). In *Wainwright*, the United States Supreme Court explained that a petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. 433 U.S. at 85.

In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263-64 (1989). The last *explained* state court judgment should be used to make this determination. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Court of Appeals rendered the last reasoned opinion discussing the Ninth Amendment issue. In denying Petitioner's claim, the Court of Appeals relied upon a state procedural bar -- Petitioner's failure to properly brief the argument on appeal. *See Kevorkian*, 248 Mich. App.

at 388-89. The failure to properly brief an argument on appeal is a recognized and well-established independent and adequate state law ground for refusing to review trial court errors. *See Mudge v. Macomb Co.*, 458 Mich. 87, 105, 580 N.W.2d 845 (1998); *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 N.W.2d 388 (1959).

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996). Petitioner in this case neither alleges nor establishes cause to excuse his default. Accordingly, this Court need not address the issue of prejudice. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983).

Additionally, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). "To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner has made no such showing in this case. Petitioner's Ninth

Amendment claim is thus barred by procedural default and does not warrant habeas relief.[2]

2. *Fourteenth Amendment*

Petitioner asserts that the right to be free from unbearable and irremediable pain and suffering is deeply-rooted in American jurisprudence and is encompassed within the rights to privacy and liberty guaranteed by the Fourteenth Amendment (and reserved by the Ninth Amendment). The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Petitioner contends that his convictions violate the Fourteenth Amendment because he had a right to assist Thomas Youk in exercising his constitutional right to be free from intolerable pain and suffering. In essence, Petitioner claims that the rights to privacy, liberty, and due process, as guaranteed by the Fourteenth Amendment, encompass a right to commit euthanasia.

The Michigan Court of Appeals discussed this issue in significant detail and concluded that Petitioner has no constitutionally protected right to commit euthanasia so that an individual may be free from intolerable and irremediable suffering. *See Kevorkian*, 248 Mich. App. at 389-405.

Having reviewed the matter, this Court concludes that the Michigan Court of Appeals' decision is neither contrary to United States Supreme Court precedent nor an

2. To the extent that Petitioner's Ninth Amendment claim is intertwined with his Fourteenth Amendment claim, it will be discussed *infra*.

unreasonable application thereof. In *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 279 (1990), the Supreme Court held that competent persons have a constitutionally protected right to refuse unwanted medical treatment, including lifesaving hydration and nutrition. The Court did so based upon the well-established traditional rights to bodily integrity and freedom from unwanted touching. *See Cruzan*, 497 U.S. at 278-79. The Court did not do based upon the notion that a person has a right to commit suicide or hasten death. *See Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (discussing Cruzan); *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (same). While the Supreme Court has acknowledged that many states authorize a physician to provide "aggressive palliative care" to lessen a person's pain and suffering, even when such action may hasten death, *see Yacco*, 521 U.S. at 801-02, the Court has made a distinction between such conduct, which is intended to relieve pain, and the action of assisting a suicide, which is intended to cause death. *Id.* The Court has never extended the rights of privacy, liberty, or due process to the realm of suicide, assisted suicide, or euthanasia. Simply put, the United States Supreme Court has never recognized a right to commit euthanasia under any legal theory, nor has it recognized euthanasia as a legal defense to murder.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997), the Supreme Court upheld Washington and New York state statutes which criminalize assisted suicide against due process and equal protection challenges, respectively. In upholding Washington's assisted suicide ban in *Glucksberg*, the Court held that "the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Glacksberg*, 521 U.S. at 728. The Court further noted that the State of Washington has legitimate

interests in preserving human life, in protecting the integrity and ethics of the medical profession, in protecting vulnerable groups from abuse, and in fearing that "permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 728-33. While several Justices issued concurring opinions in *Glucksberg* and *Vacco* reflecting varying degrees of concern for protecting an individual's rights to bodily integrity and to be free from unbearable pain and suffering, none of those Justices found that the Fourteenth Amendment guarantees a right to engage in euthanasia. *See Glucksberg*, 521 U.S. at 737 (concurring opinion of O'Connor, J.); *id.* at 747-50 (concurring opinion of Stevens, J.); *id.* at 788-89 (concurring opinion of Souter, J.); *id.* at 791 (concurring opinion of Breyer, J.).

Petitioner relies heavily upon Justice Stevens' concurring opinions in *Glucksberg* and *Yacco* to support his Fourteenth Amendment claim and related Ninth Amendment claim. As noted, however, a federal court must look to the holdings, as opposed to the dicta, of United States Supreme Court precedent in determining whether a habeas petitioner is entitled to relief in federal court. *See Williams*, 529 U.S. at 412. Given that the Supreme Court has yet to recognize a constitutional right to commit euthanasia, or even to assist in a suicide, this Court cannot conclude that the Michigan Court of Appeals' decision in this case is contrary to United States Supreme Court precedent or that it constitutes an unreasonable application thereof. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412; *see also Poole v. Goodno*, 335 F.3d 705, 709-11 (8th Cir. 2003) (habeas relief not available for claim that petitioner was entitled to a jury trial in civil commitment proceeding where Supreme Court had not established such a right); *Hayes v. York*, 311 F.2d 321, 325-26 (4th Cir. 2002) (habeas relief not warranted on basis that state of mind declaration which also conveys factual assertion does

not fit within the firmly-rooted hearsay exception where Supreme Court has never so held). Further, Petitioner has not established that the Court of Appeals unreasonably applied, or failed to apply, applicable Supreme Court precedent to a new factual context. *See* 28 U.S.C. § 2254(d)(2); *Williams*, 529 U.S. at 412. The Michigan Court of Appeals undertook a thorough analysis of Glucksberg and other relevant case law and reasonably determined that Petitioner's participation in Thomas Youk's death by lethal injection is not constitutionally protected. Petitioner is therefore not entitled to habeas relief on his Fourteenth Amendment claim, or his intertwined Ninth Amendment claim.[3]

B. Sixth Amendment Ineffective Assistance of Counsel Claim

Petitioner next claims that he is entitled to habeas relief because defense counsel was ineffective during the pre-trial period and while serving as standby counsel during trial in violation of his Sixth Amendment rights. The Michigan Court of Appeals described the relevant facts as follows:

> Before trial, defendant retained [David] Gorosh to serve as his defense attorney. However, at the December 9, 1998, preliminary examination,

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3. To the extent that Petitioner relies upon the Eighth Amendment's prohibition against cruel and unusual punishment in support of his claim, his argument is without merit: The Eighth Amendment is relevant to the application of penal sanctions and has no bearing in this matter. *See, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners").

defendant indicated that he was waiving his right to represent himself "[a]t this hearing [.]" Consequently, Gorosh and attorney Lisa Dwyer[79] entered their appearances in the trial court on defendant's behalf. Later, however, at a proceeding in the trial court's chambers, there was some indication that defendant might seek to proceed *in propria persona*. Indeed, on March 19, 1999, Gorosh informed the trial court that he believed defendant intended to "say he's going to conduct the trial in its entirety on his own *in pro per*."

In any event, while defendant did file one motion on his own behalf, it is apparent that Gorosh and Dwyer represented defendant at all times through the first day of trial on March 22, 1999. On that day, both Gorosh and Dwyer placed their appearances on the record on behalf of defendant. However, Gorosh then stated to the trial court that defendant "does want to represent himself in the trial in its entirety." In response to the trial court's questioning, defendant first stated that he was dissatisfied with Gorosh and Dwyer, prompting a colloquy in which he completely revised this statement:

> *The Court*: And do you have any reason for this dissatisfaction?
>
> [*Defendant*]: There's no dissatisfaction. This is what I planned all along.

---

79. How or why Dwyer also became defendant's attorney is not clear from the record.

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The Court: You planned all along to represent yourself?

[*Defendant*]: To represent myself, yes.
The Court: And so you have no independent dissatisfaction with your attorney?

[*Defendant*]: None.

After clearing up this point, the trial court explained to defendant that he could spend the rest of his life in prison and that a criminal trial is a formal, complex, and dynamic proceeding. Further, the trial court noted, the rules of evidence applied, as well as "certain decorum and certain ways in which there are presentations made to the jury and certain things that you can say and you can't say." The trial court asked defendant whether there was a specific reason that he wished to represent himself and he answered, "Yes."

The Court: What is that, sir?

[*Defendant*]: There are certain points I could bring out better than any attorney. Certain questions I can ask that are more pertinent.

The trial court informed defendant that, with respect to jury selection, opening statements, and closing statements, he would be bound by the rules of the court and that there would be a permanent record that might be used in other proceedings.

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The trial court stated that counsel could be present at the table with defendant in order to consult with, but that such advisors "can't get up and speak."

> [*Defendant*]: No, I said as advisors, consultation and advice. That's what I meant.
>
> *The Court*: And that's what you wish to do?
>
> [*Defendant*]: Yes.
>
> *The Court*: You're aware of all of these dangers?
>
> [*Defendant*]: Very much so.
>
> *The Court*: You understand we're talking about something that could carry a sentence of life imprisonment without any possibility of parole?
>
> [*Defendant*]: Yes.
>
> *The Court*: And do you understand that you may not disrupt or inconvenience the Court?
>
> [*Defendant*]: I'm here by my own invitation. I'll act like the guest I am.
>
> *The Court*: And that means you will follow my orders and procedures?

Appendix 2

[*Defendant*]: As a guest.

The Court: Well, it's more than a guest. You're here as a defendant, sir.

[*Defendant*]: But as a guest, propriety will be observed.

The Court: Has anyone promised you or threatened you in any way that makes you want to do this?

[Defendant]: No, not at all. It's my own free will.

In light of this exchange, the trial court determined that defendant had unequivocally, knowingly, intelligently, and voluntarily waived his right to counsel. Defendant then represented himself during jury voir dire and gave his own opening statement. On March 23, 1999, the second day of trial, before any witnesses were presented, the trial court again asked defendant if he still wished to proceed *in propria persona*. Defendant indicated that he still wished to represent himself, and did so by examining and cross-examining the witnesses. During a conference on the record in chambers on that day, the trial court again pointed out the difficulties of self-representation, to which defendant replied:

I don't want you to agonize, I really don't. Do what you know is right, do it forcefully and definitely. It won't offend

> me and if you think I'm making mistakes or I don't know what I'm doing, I'll do the best I can with my advisers here. I made this choice. I don't blame anybody else, and I don't want you to agonize over it. And I don't want you to jeopardize your position.

The trial court again raised the specter of punishment with defendant:

> *The Court*: . . . I just want you to understand that if you're convicted of this offense it's the rest of your life.
>
> [*Defendant*]: I go to jail. I go to jail, yes. I go to jail.
>
> *The Court*: Mandatory.
>
> [*Defendant*]: If I'm convicted, Your Honor, we get a shot at the Supreme Court. Not that they'll accept it, but we get a shot at it with what they want, a particularized case. They said that, we got their quotes. They want a particularized case. Four of them said we want to revisit this issue again. Now two or three years may be too quick, but when you've got someone starving to death in prison who you know is not a criminal and you know what he's doing is not a crime, maybe they'll look at it--maybe. But if not, who

cares. In 15, 20 years, they'll say well, he was right. He's dead now, but he was right. I've got to do what I know now is right and I can't let the law, which is often immoral, block me. If Margaret Sanger did that, if Susan B. Anthony did that--look at Martin--look at all these people. I'm not saying I'm like them, but they certainly--I'm certainly going to act like them. I mean, I know this is not a crime. So do you. Everybody with sense does. Your religion may say it's a sin, but that doesn't make it a crime. All these people broke the law and went to jail. I am willing to do the same.

But the Supreme Court has got to decide this on the Ninth Amendment where there is no equivocation, there is no stretching due process. They've got to do that. And if they do and break all these laws down, then we can have a better society, an honest society. I'm willing to risk that. Because at age of 71, I cannot go on living a hypocritical life when I can't do what I know is right, and the world knows I'm right. Everybody does. Every nation the majority is for what I'm doing. How come it's illegal? That's why I'm doing this.

On March 25, 1999, the third day of trial; defendant rested and gave his closing argument, during which he stated several times that he was

> acting as his own attorney. The trial court instructed the jury that defendant had a constitutional right to represent himself and that they, the jurors, must not give any negative consideration to defendant's decision to do so.
>
> The following morning, while the jury was deliberating, defendant told the trial court that he would "take your well-advised comments and withdraw in favor of my two attorneys' advice." Gorosh, Dwyer, and defendant's appellate counsel represented him at sentencing. Subsequently, defendant moved for a new trial, alleging that he had been denied the effective assistance of counsel. The trial court denied this motion.

Kevorkian, 248 Mich. App, at 406-10.

1. *Pre-Trial Representation*

Petitioner first asserts that defense counsel was ineffective during the pre-trial period. Specifically, Petitioner alleges that counsel was not qualified to handle the case, that counsel allowed his relationship with co-counsel and Petitioner to deteriorate to the detriment of the defense, that counsel erred in seeking dismissal of the assisted suicide charge, that counsel failed to prepare a defense, and that counsel failed to convince the trial court to admit the testimony of Melody and Terry Youk, Thomas Youk's wife and brother.

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

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In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690; *see also Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527, 2535 (2003).

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result. *Id.* at 696; *see also Williams*, 529 U.S. at 391-95.

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Applying the *Strickland* standard, the Michigan Court of Appeals concluded that defense counsel was not ineffective during the pre-trial period. As to the assisted suicide charge, the Court of Appeals found that counsel's conduct in seeking dismissal was part of a reasonable trial strategy and that, even if it was not, Petitioner could not show that he was prejudiced by counsel's conduct given that the trial court denied the defense motion to dismiss the assisted suicide charge and defense counsel had no control over the prosecution's decision to dismiss that charge. *See Kevorkian*, 248 Mich. App. at 413-15.

This Court finds that the Michigan Court of Appeals' decision in this regard is consistent with *Strickland* and constitutes a reasonable application thereof. Defense counsel sought dismissal of the murder charge as well as the assisted suicide charge on reasonable, albeit unsuccessful, grounds. The fact that counsel's strategy failed to benefit Petitioner does not mean that counsel was ineffective. *See, e.g.*, *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002) ("an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken"). Moreover, Petitioner cannot establish that he was prejudiced by counsel's conduct given that the trial court denied the defense motion to dismiss the assisted suicide charge and that charge was ultimately dismissed by the prosecution. Habeas relief is not warranted on this basis.

With respect to the remaining pre-trial ineffective assistance claims, the Michigan Court of Appeals determined that Petitioner failed to demonstrate that counsel was unqualified or incompetent and failed to establish that he was prejudiced by counsel's pre-trial performance. *See Kevorkian*, 248 Mich. App. at 415-16.

Having reviewed the record, this Court finds that the Michigan Court of Appeals' determination in this regard is also consistent with Strickland and constitutes a reasonable application of federal law. The fact that an attorney may be inexperienced, alone, is insufficient to establish ineffectiveness. Defense counsel is to be judged based upon the quality of assistance provided to the defendant. *See Strickland*, 466 U.S. at 687; *United States v. Cronic*, 466 U.S. 648, 658-62 (1984); *Krist v. Foltz*, 804 F.2d 944, 948 (6th Cir. 1986); *accord Pizzuto v. Arave*, 280 F.3d 949, 974 (9th Cir. 2002). Petitioner's conclusory statements about counsel's qualifications do not establish that counsel was deficient. Conclusory allegations, without evidentiary support, do not provide a basis for habeas relief. *See, e.g.*, *Workman v. Bell*, 160 F.3d 276, 287 (6th Cir. 1998) (conclusory allegations of ineffective assistance of appellate counsel do not warrant habeas relief); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3rd Cir. 1991) (bald assertions and conclusory allegations do not provide sufficient basis to hold an evidentiary hearing in habeas proceedings).

The same can be said for Petitioner's claims concerning defense counsel's relationship with co-counsel and Petitioner. While Petitioner claims that there was a breakdown in communications prior to trial, he does not explain how this purported problem impacted his defense or affected the outcome at trial. Petitioner points to no specific actions which counsel should have done, but failed to do, that would have furthered his interests in any significant way. Petitioner and co-counsel both had more than an adequate opportunity to raise any such issues before the trial court, but failed to do so. To be sure, Petitioner explicitly informed the trial court that he had no dissatisfaction with defense counsel at the time of trial.

As to the claim that counsel failed to prepare a defense, Petitioner has failed to show what more counsel could have reasonably done to benefit his case. Challenging the cause of death would have been to no avail given the videotape evidence of Youk's death and Petitioner's 60 Minutes interview. Further, Petitioner has presented no basis for disputing the medical examiner's explicit finding that Thomas Youk died from the injections given by Petitioner. The simple fact is that Petitioner had no recognized legal defense to his actions. He thus claimed that his acts did not constitute a crime, despite the law, in the hope that the jury would acquit him or convict him of a lesser charge based upon sympathy for Youk's condition or their own feelings about euthanasia. However, an assessment of prejudice must proceed on the assumption that the decisionmaker will reasonably and impartially apply the standards which govern the decision, and may not rely upon any propensity toward harshness or leniency. A defendant is not entitled to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. *See Strickland*, 466 U.S. at 695. Accordingly, a claim that a jury may have acquitted on a jury nullification theory cannot satisfy the prejudice prong of an ineffective assistance of counsel claim. *See Jones v. Jones*, 163 F.3d 285, 306 (5th Cir. 1998).

Lastly, Petitioner is not entitled to relief on his claim that counsel was ineffective for failing to have the testimony of Melody and Terry Youk deemed admissible. Petitioner asserts that counsel should have asserted a *res gestae* theory before the trial court. The record reveals that the defense sought to have Melody and Terry Youk testify at trial, but the trial court refused to allow such testimony, finding that it was either hearsay or not relevant to the matters at hand. The Michigan Court of Appeals upheld this decision, concluding that the prosecution was under no duty to produce

those witnesses and that the testimony was irrelevant to the murder charge as a matter of Michigan law. *See Kevorkian*, 248 Mich. App. at 438-43. Petitioner has not come forward with any additional factual or legal theory, missed by counsel, that would have provided a defense to murder or rendered the testimony admissible under state law. Given these circumstances, Petitioner cannot establish that he was prejudiced by counsel's conduct. Petitioner is thus not entitled to relief on his claim that defense counsel was ineffective during the pre-trial period.

2. Service as Standby Counsel

Petitioner further claims that defense counsel was ineffective while serving as standby counsel during trial. Specifically, Petitioner claims that counsel failed to make, or assist him in making, objections on his behalf during trial and that counsel behaved inappropriately in front of the jury during trial.

Relying upon federal and state law, the Michigan Court of Appeals found that Petitioner validly waived his right to counsel, exercised his right of self-representation, and was not allowed to proceed with "hybrid representation" at trial. *See Kevorkian*, 248 Mich. App. at 416-22. Given these findings, the Court of Appeals concluded that standby counsel was not functioning as counsel within the meaning of the Sixth Amendment during the trial such that Petitioner could not claim that standby counsel was ineffective under the standard set forth in Strickland. *Id.* at 422-27. Lastly, the Court of Appeals noted that, in any event, Petitioner could not establish that counsel's performance as standby counsel was objectively unreasonable or that he was prejudiced by counsel's conduct. *Id.* at 427.

Having considered the matter, this Court concludes that the Michigan Court of Appeals' decision is neither contrary to United States Supreme Court nor an unreasonable application thereof. The Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). The Sixth Amendment also grants a criminal defendant the right to self-representation, if he voluntarily and intelligently elects to do so. *Faretta v. California*, 422 U.S. 806, 819 (1975). A waiver of the right to counsel must be voluntary, knowing and intelligent, and unequivocal. *Id.* at 835; *United States v. Martin*, 25 F.3d 293, 295-96 (6th Cir. 1994). The right to defend oneself and the right to counsel are viewed as correlative rights in that waiver of one necessarily constitutes, an assertion of the other. *See United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970).

In this case, the record reveals that Petitioner voluntarily, knowingly and intelligently, and unequivocally waived his right to counsel and elected to represent himself during his trial. Petitioner is well-educated and had significant experience with the criminal process at the time of trial. After consulting with counsel, he informed the court that he wished to represent himself and clarified that he was not dissatisfied with his attorneys. The trial court advised Petitioner of the dangers of self-representation, the standards to which he would be held, the charges and sentences he faced upon conviction, and confirmed that he was choosing to represent himself knowingly and voluntarily, and unequivocally. The court informed Petitioner that defense counsel could serve as standby counsel during trial, but reminded him that counsel would only be available for advice and consultation. The court refused to allow hybrid representation.

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Petitioner claims that the trial court failed to engage in a proper colloquy to obtain his waiver. This claim is without merit. Although waiver of the right to counsel must be knowing and intelligent, a state trial court is not required to engage in a "deliberate and searching inquiry" into the reasons for a defendant's decision to represent himself. *See Noble v. Wilkinson*, 9 F.3d 109, 1993 WL, 436850, * 1 (6th Cir. 1993). Indeed, waiver of the right to counsel can be inferred from a defendant's actions. *See United States v. Gangler*, 125 F.3d 856; 1997 WL 618783, *2-3 (6th Cir. 1997) (waiver of right to counsel can be inferred from defendant's unreasonable refusal to proceed with appointed counsel at sentencing). The record clearly indicates that Petitioner knowingly and intelligently waived his right to counsel and elected to represent himself.

Petitioner also claims that his waiver of the right to counsel was not unequivocal because he requested to proceed with a hybrid defense and because the court allowed standby counsel to assist him at trial. This claim is also without merit. There is no constitutional right to "hybrid" representation or standby counsel – such matters are left to the sound discretion of the trial court. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (pro se defendant's right to self-representation not violated by the unsolicited participation of standby counsel). The trial court in this case denied Petitioner's request to proceed with a hybrid defense. Allowing standby counsel at trial did not turn Petitioner's request for self-representation into representation with active participation by defense counsel. As stated by the Supreme Court in *McKaskle*, "a defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.* The trial court specifically informed Petitioner that standby counsel would only remain for consultation and advice and would not be allowed to speak during trial.

Petitioner acknowledged his understanding and accepted this scenario. Given this fact, he cannot now complain that he was mistaken as to the roles the parties would play at trial.

Nonetheless, this Court is left with the question of whether Petitioner was entitled to the effective assistance of standby counsel. The United States Supreme Court has not yet directly answered this question. In *McKaskle*, the Supreme Court discussed the limited role of standby counsel in pro se proceedings and found that the right of self-representation is not infringed when standby counsel assists a defendant in routine matters. *McKaskle*, 465 U.S. at 183-84. In *Faretta*, the Supreme Court ruled that a criminal defendant "who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *Faretta*, 422 U.S. at 834-35 n. 46. Several circuit courts have relied upon this language, as well as *McKaskle*, to conclude that a criminal defendant proceeding pro se may not maintain a claim of ineffective assistance of standby counsel. *See, e.g.*, *United States v. Dotson*, 28 Fed. Appx. 801, 802, 2001 WL 1380390, *1 (10th Cir. 2001); *United States v. Foster*, 230 F.3d 1364, 2000 WL 1511762, *1 (8th Cir. Oct. 12, 2000) (unpublished); *United States v. Morrison*, 153 F.3d 34, 55 (2nd Cir. 1998) (citing *United States v. Schmidt*, 105 F.3d 82, 90 (2nd Cir. 1997)); *United States v. Cochrane*, 985 F.2d 1027, 1029 (9th Cir. 1993); *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992); *see also Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997) (citing *United States v. Taylor*, 933 F.2d 307, 312-13 (5th Cir. 1991) and holding that standby counsel does not represent defendant and does not qualify as the assistance of counsel required by the Sixth Amendment). Given such authority, this Court cannot conclude that the Michigan Court of Appeals' decision that Petitioner was not

entitled to the effective assistance of standby counsel is contrary to United States Supreme Court precedent or constitutes an unreasonable application thereof.

Furthermore, even assuming that Petitioner was entitled to the effective assistance of standby counsel at trial, he has failed to establish that counsel was ineffective under the standard set forth in *Strickland*, *supra*. Given the significant evidence against Petitioner, namely the videotapes of Youk's death and Petitioner's 60 Minutes interview, as well as Petitioner's lack of recognized legal defenses to the second-degree murder charge, he cannot establish that he was prejudiced by standby counsel's alleged deficiencies. As discussed supra, an assessment of prejudice must proceed on the basis that the decisionmaker will reasonably and impartially apply the standards which govern the decision-an assertion that a jury may have acquitted on a jury nullification theory cannot establish prejudice for an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 695; *Jones*, 163 F.3d at 306. Petitioner has not demonstrated that standby counsel's failure to raise objections to alleged prosecutorial misconduct or counsel's behavior while seated in the courtroom likely affected the outcome at trial or so undermined the proper functioning of the trial that it cannot be relied on as having produced a just result. Petitioner is thus not entitled to habeas relief on his claim that defense counsel was ineffective while serving as standby counsel during trial.

C. *Fifth Amendment Claim*

Lastly, Petitioner contends that he is entitled to habeas relief because the prosecution commented on his failure to testify in violation of his Fifth Amendment rights. The Michigan Court of Appeals described the relevant facts as follows:

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Defendant gave his own closing argument to the jury on March 25, 1999. Although he did not testify at the trial, at several points in his closing argument defendant injected what would appear to be first-person testimony:

> [*Defendant*]: Next time he [the prosecutor] uses the word "kill" or "murder" please ask yourselves, please--why? Did you ever ask him why I did that, why I did this act he calls killing? He says just to murder Thomas Youk that's all, to kill him. . . . Next time he [sic] you hear him utter kill, say why, and when.
>
> Why then? Why on the 17th of September? Why not a month earlier or three years earlier? Ask him why not earlier didn't he call me to kill him.
>
> Those are unanswerable questions. He can't answer those. Why did Tom Youk call name [sic] on the 15th of [sic] 16th? Why did he call me? Because he had--
>
> [*Prosecutor*]: Well, objection, Judge. He can't testify now. He can't tell the facts now. That portion's over.
>
> *The Court*: You have something in evidence. We don't know whether he's going to talk about what's in evidence.

* * *

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[*Defendant*]: I staged the whole thing. Really. I'm not much of a producer or a director in movies. We--I wanted to protect the family from possible charges–

[*Prosecutor*]: Objection, objection. Again, he's testifying. He can't put facts into--

[*Defendant*]: I'm trying to show why I did it.

* * *

[*Prosecutor*]: He cannot put facts before the jury which might not have been proven before or through testimony or other evidence. He cannot testify now.

[*Defendant*]: There were no witnesses there. Now can I say why?

[*Prosecutor*]: I'm objecting.

The Court: Well, sir, it depends on how you phrase it.

[*Defendant*]: There were no witnesses there because I didn't want anyone else--

[*Prosecutor*]: Objection.

[*Defendant*]: --implicated,

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[*Prosecutor*]: Objection.

[*Defendant*]: Well, that's--can I say why?

[*Prosecutor*]: Judge, you know, he could have gotten on--you know, he didn't--

* * *

[*Prosecutor*]: --He didn't-he can't testify now. He cannot testify now.

[*Defendant*]: Why-- why I took so much time with the needle down here. Can I say that?

The Court: You can comment about what is in evidence. You can comment about what is on the tape.

[*Defendant*]: I took my time down here in this one vein, trying to get a small vein, trying to keep–

[*Prosecutor*]: Your Honor, I'm going to object again. He's now testifying. He's putting new facts before the jury. He can't do that.

[*Defendant*]: Okay. The covering up of the needle sticks was to try to keep this--

[*Prosecutor*]: Objection.

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[*Defendant*]: Well, you talked about the needle sticks.

[*Prosecutor*]: You can't say--Judge, he's giving reasons for these things. That has to come through testimony. It can't be presented through his closing argument to the jury.

The Court: You may make argument about what they saw, but you can't introduce something new. Okay?

[*Defendant*]: After they saw the slip of paper on the floor with my name on it, this became known. It became known. Why didn't I come forward immediately after I did it? It became known only after they discovered my name on it and then I know everyone knew it would become known. It wasn't done for staging, it wasn't done to show. It wasn't videotaped for that purpose. And why was a narration, which he brings up? Can I give reasons for the narration?

[*Prosecutor*]: I object.

* * *

[*Defendant*]: That's the implication given by the prosecutors and other--other antagonists, implying that it's very cursory, that I don't really know these patients, I don't know anything about

> them. No doctor who's got integrity and is competent would proceed without definitive medical information on the patient. The only point is they don't have that information. I do.
>
> [*Prosecutor*]: Well, objection. The jury doesn't have that, either. Again, I'm going to object to him putting in facts that didn't come in during trial.
>
> *The Court*: Let's see if we can break this down. You may comment about anything that's in evidence. You may not comment about anything he said. You just can't introduce something.

The next day, while the jury was deliberating, defendant moved for a mistrial on the basis of the prosecutor's comments. The trial court denied the motion.

Kevorkian, 248 Mich. App. at 429-31.

Respondent asserts that this claim is barred by procedural default and otherwise lacks merit. As discussed *supra*, habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright*, 433 U.S. at 85. In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. *See Harris*, 489 U.S. at 263-64. The last *explained* state court judgment should be used to make this determination: *Ylst*, 501 U.S. at 803-05.

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Here, the Michigan Court of Appeals rendered the last reasoned opinion discussing the Fifth Amendment issue. In denying Petitioner's claim, the Court of Appeals relied upon a state procedural bar -- Petitioner's failure to timely object to the alleged improper conduct at trial. *See Kevorkian*, 248 Mich. App. at 432. The failure to make a contemporaneous objection is a recognized and firmly-established independent and adequate state law ground for refusing to review trial errors. *Coleman*, 501 U.S. at 750-51. Moreover, a state court does not waive a procedural default by looking beyond the default to determine if there are circumstances warranting review on the merits. *See Paprocki v. Foltz*, 869 F.2d 281, 285 (6th Cir. 1989); *see also Dumas v. Pitcher*, 2003 WL 21801460, *1 (6th Cir. Aug. 4, 2003) (unpublished) (applying procedural default where Michigan court conducted review for plain error). Nor does a state a court fail to sufficiently rely upon a procedural default by ruling on the merits in the alternative. *See McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991). In this case, the Michigan Court of Appeals denied Petitioner's Fifth Amendment claim based upon his failure to timely object at trial and his failure to establish plain error requiring reversal. *Kevorkian*, 248 Mich. App. at 432-38.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 753; *Gravley*, 87 F.3d at 784-85. In this case, Petitioner alleges that trial counsel was ineffective as cause to excuse his default. Even assuming that Petitioner could establish that trial counsel erred, however, he cannot establish prejudice as his underlying claim lacks merit.

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The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Supreme Court has determined that this provision "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). *Griffin* thus prevents a prosecutor or trial judge from suggesting to the jury that it may treat a defendant's silence as substantive evidence of guilt. *See Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). However, the protection of *Griffin* is not absolute. For example, the Griffin prohibition on comment by the prosecutor does not apply "where . . . the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel." *United States v. Robinson*, 485 U.S. 25, 32 (1988).

When the alleged Fifth Amendment violation consists of an indirect reference on the failure to testify, a reviewing court must consider all the surrounding circumstances to determine whether a constitutional violation has occurred. *See Byrd v. Collins*, 209 F.3d 486, 533 (6th Cir. 2000) (citing cases). Such comments warrant reversal only when they are "manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." *Bagby v. Sowders*, 894 F.2d 792, 797-98 (6th Cir. 1990). A court should not find manifest intent from such comments if some other explanation for the prosecutor's remarks is equally plausible. *See Lent v. Wells*, 861 F.2d 972, 975 (6th Cir. 1988).

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The Sixth Circuit has established a four-factor balancing test to be used in determining the constitutionality of a prosecutor's indirect reference to a defendant's failure to testify:

> (1) Were the comments "manifestly intended" to reflect the accused's silence or of such a character that the jury would "naturally and necessarily" take them as such;
>
> (2) Were the comments isolated or extensive;
>
> (3) Was the evidence of guilt otherwise overwhelming; and
>
> (4) What curative instructions were given, and when.

Byrd, 209 F.3d at 533-34; *Lent*, 861 F.2d at 975.

Applying these factors to Petitioner's claim, the Court concludes that the prosecutor's objections did not violate Petitioner's constitutional rights. First, there is no indication that the remarks were manifestly intended to comment on Petitioner's exercise of his right not to testify. To the contrary, as discussed by the Michigan Court of Appeals, *Kevorkian*, 248 Mich. App. at 437-38, it is clear from the record that the prosecutor was trying to prevent Petitioner from arguing facts not in evidence and from offering his own new testimony to the jury without being subject to cross-examination. *See Bontempo v. Fenton*, 692 F.2d 954, 959 (3rd Cir. 1982); *United States ex rel. Miller v. Follette*, 397 F.2d 363, 365-67 (2nd Cir: 1968); *State v. Brannson*, 679 S.W.2d 246, 249 (Mo. 1984). The prosecutor never indicated nor implied that

the jury should infer Petitioner's guilt from his decision not to testify at trial. As to the second factor, the prosecutor's remarks were somewhat isolated, amounting to brief objections during a relatively lengthy closing argument and three days of trial. *See United States v. Epley*, 52 F.3d 571, 577 (6th Cir. 1995). With respect to the third factor, there was substantial evidence of Petitioner's guilt presented at trial. Most notably, the videotapes of the incident. Finally, with respect to the fourth factor, the trial court instructed the jury that Petitioner had no obligation to testify or prove his innocence and that they should not consider Petitioner's decision not to testify in rendering their decision. Such a curative instruction, even though given during the general jury instructions and not at the time of the prosecutor's-statement, weighs in favor of finding that the prosecutor's comment was not unconstitutional. *See Epley*, 52 F.3d at 577; *Spalla v. Foltz*, 788 F.2d 400, 404 (6th Cir. 1986). Petitioner has thus failed to establish that the prosecutor impermissibly commented on his right not to testify in violation of the Fifth Amendment.

Lastly, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably res[illegible] the conviction of one who is actually innocent. *Schlup*, 513 U.S. at 326-27; *see also Bousley*, 523 U.S. at 624. As noted, a claim of actual innocence requires a petitioner to support his allegations of constitutional error with new reliable evidence of factual innocence that was not presented at trial. *Schlup*, 513 U.S. at 324. Petitioner has made no such showing. His Fifth Amendment claim is thus barred by procedural default, otherwise lacks merit, and does not warrant habeas relief.

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V. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to federal habeas relief on the claims presented. Accordingly,

IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE**.

s/ Nancy G. Edmunds
NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

DATED: SEP 29 2003

APPENDIX 3 — PERTINENT PORTIONS OF CONSTITUTIONAL AMENDMENTS

Amendment V

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law [.]

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Amendment XIV

> Section 1. No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law [.]

APPENDIX 4 — AFFIDAVIT OF LISA DWYER DATED MAY 21, 1999

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Lisa Dwyer, Esq., having first been duly sworn, deposes and says:

1. I am an attorney who has been a member of the State Bar of Michigan since 1993.

2. 1 served as co-counsel for Defendant, Dr. Jack Kevorkian, in the instant action at the request of lead defense trial counsel, David Gorosh, Esq.

3. I submit this affidavit at the request of Dr. Kevorkian's appellate counsel.

4. I have personal knowledge of the facts and information set forth herein, and I am competent to testify thereto if called as a witness at an evidentiary hearing or otherwise.

5. In November 1998, David Gorosh contacted me and requested me to serve as co-counsel in an up-and-coming matter with Dr. Kevorkian.

6. During the initial stages of our co-representation of Dr. Kevorkian, it appeared to me as though I would have input regarding defense strategies. However, by the time of the preliminary examination, it became apparent that my input regarding defense strategies would have little weight with Mr. Gorosh.

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7. By January 1999, I discussed with Mr. Gorosh withdrawing as co-counsel because our working relationship had deteriorated, primarily because he dismissed my input regarding defense strategies. In addition, I was working between 60-70 hours per week at another firm because my boss was on a month long vacation and, therefore, I had a great deal of additional responsibilities. Because Mr. Gorosh dismissed my input to the case, my association with the case seemed pointless and I was working myself to death. This was a particularly important point during our representation of Dr. Kevorkian because motion deadlines were approaching.

8. Despite my misgivings, Mr. Gorosh persuaded me to continue as co-counsel because I had developed a good working relationship with Dr. Kevorkian. I agreed to continue to act as co-counsel because I felt a sense of commitment to the defense of Dr. Kevorkian, a sense of commitment to Mr. Gorosh despite the way things were proceeding, and a belief that I could provide a valuable contribution if given the chance.

9. Mr. Gorosh's control over all aspects of the case became unyielding. Mr. Gorosh ignored my input into defense strategies, withheld information from me, made public statements to the media without consulting me, and refrained from notifying me about issues that had arisen. It also appeared to me that Mr. Gorosh was ignoring the input of Dr. Kevorkian.

10. For instance, Mr. Gorosh and I were directly at odds with regard to the motion practice on the case. Despite Dr. Kevorkian and my input regarding the filing of a motion to quash the criminal assistance to suicide count, Mr. Gorosh proceeded with this motion as the leading motion. Further,

the motion to quash the murder charge written by me was discounted by Mr. Gorosh as being contradictory to his motion to quash the assisted suicide count. Also, a common law challenge to the murder count that had been prepared by me, and included in the original draft of the motion to quash the murder charge, was deleted from the motion by Mr. Gorosh because he failed to grasp the legal argument.

11. Mr. Gorosh and I argued heatedly about these two motions wherein he informed me that nobody knew the case better than him. I indicated that I was of the opinion that when defending a murder case all efforts should be put toward attacking the murder count. Also, I reminded him that the motion challenging the murder count was meritorious. Further, I explained to him that there was a way to credibly argue both motions, but that both motions had to be argued. Mr. Gorosh rejected my input and, at the motion hearing, neglected to zealously advocate the dismissal of the murder count.

12. As the trial approached, it was my understanding that Dr. Kevorkian wished to proceed with a hybrid defense -- Mr. Gorosh and I would serve as advocates regarding certain matters and as advisers regarding others. Despite this understanding and the numerous prompts by me to Mr. Gorosh to discuss precise trial duties with Dr. Kevorkian, such a necessary conversation never took place.

13. On March 19, 1999, Judge Jessica Cooper advised Mr. Gorosh and me that she would not allow a hybrid defense at trial. Judge Cooper indicated that either Dr. Kevorkian would represent himself at trial or that he would be represented by counsel, but not both. Dr. Kevorkian agreed to allow Mr. Gorosh and me to conduct the trial.

14. Mr. Gorosh indicated that he would conduct voir dire -- because it would be a "story" if he did not conduct jury selection. He also stated he would conduct opening statement, closing argument, and examination the witnesses, aside from Dr. Dragovic. He also said he would conduct the examination of Dr. Kevorkian, despite the fact that he and Dr. Kevorkian were not communicating and had very little substantive conversation about the case.

15. During the weekend proceeding the trial, March 20 and 21, 1999, everything fell apart. That Saturday, I did not see Mr. Gorosh make any substantive preparations for trial. He spent most of the day arguing with the other attorney barely had a working relationship with Dr. Kevorkian whom he had working with him. In addition, Dr. Kevorkian had indicated to Mr. Gorosh that he did not want this other attorney involved with the trial.

16. On Sunday, March 21, 1999 at 10 a.m., Mr. Gorosh and I were to meet with Dr. Kevorkian. I arrived at 10 a.m., met with Dr. Kevorkian and discussed with him the division of trial duties. He stated that I would conduct the examination of him when he testified.

17. On Sunday, March 21, 1999, at about 10:30 a.m., Mr. Gorosh and the other attorney arrived at the meeting. Immediately, Dr. Kevorkian became distressed that the other attorney, whom he had explicitly instructed Mr. Gorosh not to bring, was present. Until that moment, I was unaware that Dr. Kevorkian had discussed this other attorney with Mr. Gorosh. A one-sided argument ensued wherein Dr. Kevorkian told Mr. Gorosh he did not trust him any more. This argument continued for nearly an hour.

18. Dr. Kevorkian ultimately stated in no uncertain terms to Mr. Gorosh that he would represent himself unless I could represent him at the trial. Mr. Gorosh, however, was adamant that I could not represent him. Mr. Gorosh and I thereafter discussed this issue, and Mr. Gorosh advised me that I could not conduct the trial because he was lead counsel and that it would damage his reputation if I replaced him. I then suggested that I could conduct the substantive aspects of the trial at the beginning stages with the hope that Mr. Gorosh and Dr. Kevorkian would make amends once the trial commenced. Mr. Gorosh would not agree with this proposal because he said it would damage his reputation.

19. Because Mr. Gorosh made it clear that he would not permit me to act as trial counsel, when Dr. Kevorkian again asked me to represent him at trial, I indicated my reservation about conducting the trial solo because terminating Mr. Gorosh would cause a great deal of publicity. In addition, I told Dr. Kevorkian I felt awkward because Mr. Gorosh had asked me to assist as co-counsel. Dr. Kevorkian, knowing that acting as his own lawyer would be detrimental to his case, nevertheless decided he would rather represent himself than be represented by Mr. Gorosh. Had Mr. Gorosh permitted me to act as lead counsel, Dr. Kevorkian would not have represented himself.

20. I discussed with Mr. Gorosh the breakdown of the attorney-client relationship on our way to court on March 22, 1999. I suggested that he indicate this to Judge Cooper in chambers upon arrival. But Mr. Gorosh refused.

21. At court on March 22, 1999, Judge Cooper called counsel into chambers to discuss preliminary matters. Mr. Gorosh indicated to Judge Cooper that Dr. Kevorkian would be representing himself with us acting as his advisors. Given

the import of this news, Judge Cooper questioned Mr. Gorosh. Mr. Gorosh never informed Judge Cooper of Dr. Kevorkian's desire to have me act as lead counsel and to be the person primarily responsible for conducting the trial. Mr. Gorosh appeared to me to be deliberately undermining Dr. Kevorkian to the court, suggesting his incompetence or that he may disrupt the proceedings. I did not believe Mr. Gorosh was acting in the best interests of the client. I left during this conference after briefly stating that there had been a breakdown in the attorney-client relationship.

22. During the pendency of my representation of Dr. Kevorkian, I was appreciative to Mr. Gorosh for the opportunity to be involved with such an intellectually challenging and interesting case. Because of this, at the time it was awkward to be assertive with Mr. Gorosh about our duties to Dr. Kevorkian. However, in retrospect, I realize that I abdicated my responsibilities to the client. I should have advised Dr. Kevorkian to put his concerns about his representation on the record. I realize my actions deprived Dr. Kevorkian of counsel of choice.

23. Throughout the trial, Mr. Gorosh displayed contempt and ridicule for Dr. Kevorkian. On occasion, he would make comments under his breath, roll his eyes, deeply sigh, put his head in his hands, smirk and seemingly share the Court's discomfort during difficult points. Further, Mr. Gorosh provided very little substantive advice and consultation to Dr. Kevorkian. Mr. Gorosh was seated between Dr. Kevorkian and I which made it nearly impossible for me to communicate with the client.

24. When Dr. Kevorkian asked Mr. Gorosh to assist him with the legal argument and offer of proof regarding calling the Youk's as witnesses, Mr. Gorosh was not prepared with an

offer of proof or research in support of calling the Youk's (Melody and Terrence) as witnesses. When the Youk's were added to our witness list subsequent to the Court's ruling on the pretrial motion, I asked Mr. Gorosh about it and he concluded that their testimony was relevant. (In principle, I agreed but we had a court order with which to deal.) During lunch recess, I referred to my emergency resources and prepared an offer of proof and legal argument for Dr. Kevorkian. The afternoon session was adjourned allowing an opportunity to prepare and file a memorandum on the issue. Mr. Gorosh and I did so. I believe the record was adequately protected and preserved.

25. During Dr. Kevorkian's closing argument, Mr. Gorosh made an under-his-breath statement that Dr. Kevorkian overheard, interrupting Dr. Kevorkian's closing. Dr. Kevorkian paused momentarily, then continued.

26. During the prosecutor's closing argument and/or rebuttal argument, I requested Mr. Gorosh to instruct Dr. Kevorkian to object. However, Mr. Gorosh advised Dr. Kevorkian to object on only one occasion. This occurred when the prosecutor compared Dr. Kevorkian's actions to genocide.

27. After closing arguments, I told Dr. Kevorkian and Mr. Gorosh that it was necessary to make a record on the prosecution's reference in closing argument to Dr. Kevorkian's failure to testify. This discussion evolved to the point that I was going to stand alone as an officer of the court and make the record because Mr. Gorosh thought this delayed record would make it appear as if we were incompetent. Fortunately, counsel Mayer Morganroth stopped into the courtroom and persuaded Dr. Kevorkian to make this objection.

Appendix 4

Further deponent sayeth not.

s/ Lisa Dwyer
Lisa Dwyer, Esq.

Subscribed and sworn to before me
this 21 day of May, 1999.

s/ Michelene T. Sager
Notary Public

APPENDIX 5 — AFFIDAVIT OF MICHAEL ALAN SCHWARTZ DATED MAY 18, 1999

STATE OF MICHIGAN)
) ss.:
COUNTY OF OAKLAND)

MICHAEL ALAN SCHWARTZ, first having been duly sworn, deposes and says:

1. I am an attorney who is a member of the State Bar of Michigan in good standing.

2. Over the past eight (8) years, I have represented Dr. Jack Kevorkian along with my partner, Geoffrey Fieger.

3. While my partner was the Democratic candidate for Governor of Michigan in 1998, Dr. Jack Kevorkian and Dr. Georges Reding were arrested on misdemeanor charges of assaulting a police officer and obstructing justice involving an incident at William Beaumont Hospital in Royal Oak, Michigan.

4. I appeared on behalf of Dr. Kevorkian and I assigned David Gorosh to appear on behalf of Dr. Reding in *People v Reding and Kevorkian*, 44th District Court Case No. 98-54290, 54291, pending before the Hon. Daniel Sawicki.

5. AC the time, I knew that Gorosh had had some experience as a public defender but that his trial experience was extremely limited. To the best of my knowledge, Gorosh had never tried a homicide case and I was unaware of any felony cases which he had tried.

6. Inasmuch as I would have a supervisory role as lead counsel for the defense, I felt comfortable in having Gorosh serve in a capacity in which he would have my continuous personal guidance during the trial.

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7. On October 5, 1998, the date set for jury selection, I was taken to the hospital as a result of chest pains which I was suffering. I previously suffered a heart attack in August, 1996 and my left anterior descending coronary artery is completely blocked.

8. On October 5, 1998, while I was in the Coronary Intensive Care Unit at Henry Ford Hospital in Detroit, I received a telephone call from David Gorosh in which he announced his intention to pick a jury.

9. I ordered him not to pick a jury, telling him that inasmuch as I was representing Dr. Kevorkian, it was unacceptable that he pick a jury without my input. It should be noted that at the time, I had over 25 years experience as an attorney, having tried over 40 criminal jury cases to completion, including homicide cases, whereas Gorosh, who was a lawyer for only three (3) years at the time.

10. Gorosh insisted that he was able to pick the jury and declared his intent to do so, irrespective of the fact that, as his supervisor, I had instructed him not to do so.

11. Later in the day, Gorish came to my hospital bed at the Coronary Intensive Unit at Henry Ford Hospital where I was hooked up to monitoring devices and had an intravenous drip placed in my arm. He pleaded with me to allow him to pick the jury. I reiterated that no jury was to be selected until I was well enough to return to court.

12. It was only when Dr. Kevorkian discharged Gorosh in open court that the jury selection was put off until I returned.

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13. Thereafter, Gorosh made some distasteful and reprehensible statements about my partner, Geoffrey Fieger, which were reported by the newspapers.

14. It became obvious to me that when faced with a situation in which he was required to subordinate his own interests for the benefit of his client, Gorosh was either unwilling or unable to do so.

15. Gorosh then left the employ of Fieger, Fieger & Schwartz, P.C.

16. Thereafter, Dr. Kevorkian was arrested on murder charges in connection with the death of Thomas Youk. Dr. Kevorkian was also charged with assisting in a suicide and delivery of a controlled substance.

17. Dr. Kevorkian determined that he wanted to represent himself at trial and that he wished to have a lawyer who would perform legal work in connection with the case other than examining witnesses.

18. Gorosh became a self-styled legal adviser to Dr. Kevorkian and engaged in certain pre-trial motions.

19. On one occasion, just before the preliminary examination in the 51st District Court, I strongly advised Gorosh not to seek dismissal of the assisted suicide charge, stating to him that the prosecutor had engaged in *a faux pas* by charging both murder and assisting in a suicide since the two charges were repugnant of one another. Gorosh dismissed the suggestion.

20. Subsequent to the bindover by the magistrate, I again strongly urged Gorosh not to seek dismissal of the assisted suicide charge. I made it clear that with both charges pending,

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Dr. Kevorkian would have a much stronger argument that the prosecutor was on a witch hunt, since in order to argue for both charges, the prosecutor would essentially have to claim that Dr. Kevorkian murdered Youk and that Youk then became resurrected only to kill himself and die a second time with the aid of Dr. Kevorkian. Obviously, such a situation would have exposed the prosecution to ridicule or worse and would have been a definite advantage for Dr. Kevorkian. Gorosh, whose experience as a criminal defense trial lawyer was extremely limited, insisted that it was important to have whatever charges dismissed as soon as possible, even if that meant giving up arguments which could otherwise have been made on behalf of his client.

21. My partner, Geoffrey Fieger, who had successfully defended Dr. Kevorkian on a number of assisted suicide cases previously, also strongly advised Gorosh not to seek dismissal of the assisted suicide charge prior to trial.

22. Gorosh then proceeded to move for the dismissal of the assisted suicide charge, despite having been warned by me on at least two occasions that such a course was unwise and would do damage to Dr. Kevorkian and having been given the same warning my Geoffrey Fieger.

23. It was clear to me that Gorosh was ill-equipped to serve as chief defense counsel in a significant murder case given his lack of experience, his inability to grasp important strategic considerations, and his ultimate failure to consider the best interests of his client.

FURTHER DEPONENT SAITH NOT.

s/ Michael Alan Schwartz
MICHAEL ALAN SCHWARTZ

s/ Jill Brandana
Notary Public

APPENDIX 6 — EXCERPTED TRANSCRIPT OF PROCEEDINGS OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 23, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

JURY TRIAL – VOLUME II OF IV

Before HONORABLE JESSICA R. COOPER, Judge, and Jury

Pontiac, Michigan – Tuesday, March 23, 1999

* * *

[8] MR. SKRZYNSKI: I'm going to give the Court the exhibits.

THE COURT: Thank you.

MR. SKRZYNSKI: Your Honor, I'd just ask to make sure that everybody on the jury has one copy that says 60 Minutes Tape at the top and one copy that says Kevorkian Tape at the top. Does everybody have those two?

And your Honor, I'd ask formally for the admission of those exhibits.

THE COURT: I take it, sir, there is no objection, then?

DR. KEVORKIAN: Yes, ma'am?

THE COURT: No objection?

DR. KEVORKIAN: No.

(People's Exhibits No. 1 through No. 4 received)

THE COURT: Do you wish to see this tape, also, as it's being played?

DR. KEVORKIAN: Well, I'm pretty much familiar with the tape, your Honor.

THE COURT: You have the right to move if you [9] would like to or we can move this back for you.

DR. KEVORKIAN: No, I'm--I'm familiar with the tape.

THE COURT: All right.

MR. SKRZYNSKI: For the record, your Honor, I'm going to play Exhibit No. 1 which is the Kevorkian tape.

THE COURT: Again, for the record, Mr. Gorosh has moved so he will be observing it.

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* * *

[75]Q Now Doctor, you also examined--you said that the brain and the spinal cord were preserved, is that correct?

A That's correct.

Q And you then examined those things at a later time, didn't you?

A That's correct.

Q As a neuropathologist you specialize in examining those body parts, correct?

A Yes, sir.

Q Now when you examined those body parts, did you determine anything?

A Well, there was evidence of degenerative disease process which is known as motor neuron disease or amyotrophic lateral sclerosis, or Lou Gehrig's disease. It's more commonly known as Lou Gehrig's disease which is a condition that, for unexplained reasons, develops [76] in the--affects the central nervous system and leads to extreme wasting of the muscles and leads to extreme incapacitation.

Q So the wasting of the muscles that you described earlier, that you saw both externally and internally, is related to the degeneration you found in the brain and the spinal cord?

A Yes, sir.

Q And that's ALS?

A That's what's medically known as amyotrophic lateral sclerosis or, more specifically, motor neuron disease because it affects selectively the nerve cells that control the skeletal muscle or known as Lou Gehrig's disease.

Q Okay. Doctor, did ALS cause Tom Youk's death?

A No, sir.

Q Did it have any underlying cause--was it an underlying cause of Tom's death at all?

A No, sir. The ALS was a condition present in the body of Mr. Youk, but the cause of death was poisoning by intravenously injected substances.

Q Did it contribute to the death at all?

A No.

Q Okay. So it was completely divorced from his death?

A Well, it was in his body, but it didn't cause his [77] death.

Q Now Doctor, when you fill out a death certificate--when you filled out the death certificate originally in this case, do you recall--Dr. Pacris did that, didn't he?

A Dr. Pacris did, yes.

Q Okay. Do you recall initially what the cause of death was?

A Initially the cause of death was pending.

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Q Pending?

A Pending. That's the type of situation where analysis and further tests are being done by either microscopic examination or toxicological analysis and we have that option as defined by law. This is a statutory option for us to keep the case pending until we get the answers from different tests.

Q And the tests that you were awaiting to come back were the toxicology report from the blood?

A Well, that--of course, that was number one thing because of the evidence of needle puncture wounds that were quite fresh on both hands and it was clear at the time that some substance had been introduced in the body of this man.

Q So then you amended the death certificate when those results came back?

A When those results were back, then the death [78] certificate was amended and the cause of death was established and the manner of death was established.

Q And the cause of death was then determined to be what?

A The cause of death was poisoning by intravenously injected substances and the manner of death was homicide.

Q Okay. Now you amended the death certificate again, did you not, after you did the examination on the brain and spinal cord?

A Dr. Pacris did it after all the special studies and stains were done later on. He put--as other significant findings, he included amyotrophic lateral sclerosis because it is our obligation to report all the significant findings in the body to the State which is Bureau of Vital Statistics that carries out that information and uses it for various purposes.

Q So you amended the death certificate again to indicate that that was another significant finding?

A Yes, sir.

* * *

[90]Q All right. Now you said that ALS contributed in no way to his death, is that true?

[91]A That's correct.

Q This is the amended death certificate, amended October 7, and I want you to read this fine print right there, please, out loud.

A Other significant conditions contribute--other significant conditions is underlined, and then contributing to death but not resulting in the underlying cause given in Part I.

Q No, that says significant contributing.

A Well, it says other significant contributing conditions and--

Q And significant means?

A It means significant. That's underlined. And then there is contributing to death but not resulting in the underlying cause given in Part I.

Q True. But it's contribute to the death significantly, isn't that what that statement says?

A Yes.

* * *

[95] THE COURT: All right. If at any time I'm not you'll stop me or ask for some type of further explanation. You have your attorneys there to explain that to you. Again, I cannot be a professor here, I'm a judge. I'm trying to keep this as orderly as possible. There are times for argument, there are times for cross examination, and you want to try not to mix those two and you're going to draw an objection. And I'll respond only to objections. The same thing, if you have an objection, sir, and your attorneys are [96] saying that there is something going on here that you need to object to, then you should get up and object and I'll take your objection, he'll respond to the objection, and I'll make a ruling. Okay? So you don't have to sit passively by and your attorneys are there to aid and assist you, and the record should reflect that they have been there throughout the trial.

Is there anything further that I can say? I can't go into a long dissertation or legal analysis here, but again, if you try and keep argument separate from cross examination and when you have any questions, that's what they're there for. They're there to aid and assist you and if, at some point, you decide that you've changed your mind about representing yourself, then please tell me that and we'll make another record. Okay?

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* * *

[98] THE COURT: You have the opportunity to respond and your attorneys can help you respond and then I make a ruling. I'm just the referee here so if he objects, you respond and then we can make a ruling.

* * *

[101] MR. SKRZYNSKI: Very well.

THE COURT: Is there anything further, or can we take this break?

MR. SKRZYNSKI: Your Honor, those are all the matters I have.

THE COURT: Anything further?

DR. KEVORKIAN: No.

THE COURT: And again, you understand that at any time there's a problem you consult with your attorneys, any time you want to change your mind and respond. This man is attempting to convict you of murder in the first degree. You need to respond to his objections. Okay?

DR. KEVORKIAN: Yes.

* * *

[122]Q Anything else?

A Actually, we had conversation as to your helping my husband end his suffering.

Q And what did you--can you remember what you said to me? If you have to paraphrase it, paraphrase it.

A Well, upon meeting you, we explained to you about my husband's situation and we understood that you might be able to assist us in relieving his suffering.

Q In your presence, Melody, did Tom make any statements?

A Yes, Dr. Kevorkian. We had conversation between the three of us as to what we hoped Tom might be accomplished or what you might be able to help us with, and from that conversation we became understanding that you, from a physician of what we thought was compassion, would help us to bring an end to this situation.

* * *

[135] . . . My intent is not to kill, it's to do my duty as a physician. And they often have disagreeable outcomes when you do your duty, and this is one very disagreeable outcome. And that's the clearest I can make it, Your Honor.

THE COURT: I see. Your attorney has asked to consult with you again:

DR. KEVORKIAN: No further questions or comments, Your Honor.

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* * *

[137] THE COURT: It's an element of the crime. But the fact that she didn't want you to do something-people--the fact that she didn't want you to do something doesn't go to your state of mind.

DR. KEVORKIAN: Well, who else would know my state of mind but me?

THE COURT: Speak with him.

DR. KEVORKIAN: I'll state what he said. I'm not offering it for the truth of the matter.

THE COURT: What are you offering it for?

DR. KEVORKIAN: My view, my state of mind, not the truth of the matter.

THE COURT: You're not offering it for the truth of the matter asserted?

DR. REVORKIAN: That's right.

THE COURT: What are you offering it for?

DR. REVORKIAN: That's right. How I reacted, how it made me feel, how I developed my mental processes in this situation.

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* * *

[145] MR. SKRZYNSKI: If somebody is requesting a conference, that's fine with me. I don't care.

DR. KEVORKIAN: Yes, we're requesting a conference.

MR. SKRZYNSKI: That's fine, Judge.

THE COURT: They're requesting a conference.

Let's conference.

(Conference held in Chambers about 2:07 p.m.)

THE COURT: The record will reflect that we again had discussion, that discussion is placed on record. There is a record of the in chambers discussion that was made and once again this Court spoke with the defendant about the two Constitutional rights, the two competing rights. The defendant chose his right to represent himself, but he has requested the opportunity to submit a trial brief on the issue of the testimony of the witnesses that he wishes to put forth and that trial brief will be presented to the Court by nine o'clock tomorrow morning.

Is that an accurate summation of the conference that we had in chambers?

MR. SKRZYNSKI: Yes, Your Honor.

DR. KEVORKIAN: Yes.

* * * *

APPENDIX 7 — AFFIDAVIT OF JACK KEVORKIAN, MD DATED MAY 29, 1999

David Gorosh never did or reported to me about any task I requested of him, either at all, or in time — despite often repeated requests on my part. This was the beginning of my lack of trust and confidence.

— He never prepared to show me a complete witness list.

— He never informed me about planned media appearances, and never contacted about them, despite my order to stop talking to the media.

— He never coached me regarding questioning of witnesses or procedures of objection, even though the prosecutors' outlandish claims and arguments infuriated me.

— He persisted in inviting on his own, young and inexperienced attorneys I *neither* requested nor wanted, — persisted despite my *vociferous* demand.

— He rarely returned my phone inquiries, and *never* on time.

— He *furtively* (for me) argued to drop the charge of assisting suicide, despite my repeated (at least a dozen times) and *equally vociferous* wish to retain it.

— He insisted on sitting between Lisa Dwyer and me, despite my wish to often consult with Lisa; and I refrained from reprimanding his insolent behavior for fear of compromising the appearance unity in open court.

Appendix 7

By mid-trial I was convinced that Gorosh was incapable of adequate counsel. Near the end I was shocked at how unscrupulous he is: immediately before Melody Yonk was to take the stand, Gorosh suggested that she lie and say that on the night of Thomas Yonk's death she (Melody) expected him to be alive when she returned home. I said, "never, — nobody lies!" He never mentioned it again.

s/ Jack Kevorkian, MD
29 May 1999

Witness:

s/ Ruth Holmes
Ruth Holmes

Date: 5/29/99

APPENDIX 8 — EXCERPTED MOTION OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 3, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

MOTION

BEFORE HONORABLE JESSICA R. COOPER, JUDGE

Pontiac, Michigan – Wednesday, March 3, 1999

* * *

[12] THE COURT: And the murder one to stay?

MR. GOROSH: What I would like, Judge, is one of two things. If in fact Your Honor believes that the participation language does in fact include what was contemplated in *People* v *Kevorkian*, then you have to dismiss that charge. And then in fact I suppose they could try to proceed on the participation prong of the third element.

THE COURT: Let me see if I've got this straight. You want this Court to dismiss the four-year felony and let him go to trial on murder in the first degree?

MR. GOROSH: No, just the opposite, Judge.

THE COURT: Because they're in opposite?

MR. GOROSH: No, just the opposite, Judge. What I'm saying is if you believe that the participation language does in fact contemplate the *Kevorkian* case, if you come to that conclusion, then in fact they could proceed on a different element in the assisted suicide statute. They could participate on the participation element because that was what was contemplated under assisted suicide. They're not arguing that now. But if in fact you were to agree [13] with us that that in fact does apply in this case, I'm sure they'd come back and they'd amend their Complaint and say we're going to proceed on the participation element of the third--or the third element, and I believe that's the second prong.

THE COURT: What if they decide not to participate on assisted suicide at all and they just go for murder?

MR. GOROSH: What do you mean?

THE COURT: What if they decide--they listen to your well-spoken and well-reasoned argument and they decide that they're going to nolle pros assisted suicide?

MR. GOROSH: I'm sure that's within their discretion, but I've put before the Court what I believe to be an accurate argument and an accurate recitation of the facts.

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THE COURT: And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?

MR. GOROSH: I don't want them to. I want Your Honor to come to the conclusion that the participation language is contemplated--the participation language in the newly enacted assisted suicide statute is contemplated and does contemplate [14] the *Kevorkian* case. You either agree with that or you don't. If you don't agree with it, then in fact the assisted suicide charge has to dismissed. If you do agree with it, then the murder charge is dismissed and I would imagine you could also dismiss the assisted suicide charge, but they'd probably standup at that point and say well, Judge, if you believe that the participation language in the assisted suicide statute is controlling, then we're going to proceed on that count. But I also imagine they'd probably appeal the case so we'd be back before you at another time. But that's of no consequence.

Again, the--essentially, for lack of a better word, the ball is in your court. I mean, you make a decision as to whether or not the participation language is contemplated.

THE COURT: I've noticed the ball is in my court.

MR. GOROSH: I'm sure you have. And essentially that's where we stand, Judge. We're not asking for--ideally, ,of course--of course we would love for the murder charge to be dismissed if you agree with our contention that the participation language is contemplated and at that time, as I [15] stated, he'll stand up and he'll proceed on the participation language under the assisted suicide statute. That's providing he doesn't appeal, which I highly doubt.

Thank you.

THE COURT: Okay.

MR. SKRZYNSKI: Good morning, Judge.

THE COURT: Good morning.

MR. SKRZYNSKI: The assisted suicide count does not apply to the act of murder which occurs on September 17th. The assisted suicide count applies to what occurred on September 16th when Dr. Kevorkian and Thomas Youk planned Thomas Youk's suicide. When they discussed the use of Kevorkian's suicide machine or device, when he offered that to Thomas Youk as an alternative, that was in the stages of planning.

Mr. Gorosh indicates that the statute requires that there have been a plan arrived at. I'm an--I was an English teacher, Judge, and one of the things I noticed about the statute was that it says that if you know that somebody wants to kill themselves, and if you intend to help them kill themselves, and if you do the following, you're guilty. And it says "helps the individual plan to attempt to kill [16] himself or herself".

Now helps plan is not a--it's not a noun. The word "plan" there is not a noun. In other words, it doesn't say you must arrive at a plan. That's plan used as a noun. It says help plan, plan as a verb. That's an action. In this case we're saying that the action that Dr. Kevorkian participated in with Thomas Youk was the planning of his assisted suicide. That plan was ultimately changed when Kevorkian convinced Youk to allow Kevorkian to kill Youk himself by injecting chemicals directly, but initially there was planning for an assisted suicide.

Appendix 8

And I said in my brief that the evidence at the preliminary examination demonstrates that the Defendant intended to help Tom Youk die, no matter what the method was. At one point Defendant intended to help Mr. Youk kill himself, even though Defendant ultimately killed Tom Youk. Defendant had Mr. Youk sign a consent form indicating that Mr. Youk consented to direct injection, and on the tape Kevorkian says, "Instead of using the device, the machine".

And we know that the device or the machine that he's talking about is an assisted suicide machine.

[17] It is a device that's controlled by the person who is committing suicide himself, whereby the person activates the flow of the deadly drugs by the use of strings. And implied in that, in that discussion where Dr. Kevorkian says you have chosen direct injection instead of the machine, is that the machine was offered as an option

At the time that Dr. Kevorkian offered the machine as an option, he was intending to help Thomas Youk kill himself. There was suicide being planned and that's what the assisted suicide count covers. It covers the planning of the assisted suicide which occurred on September 16th. That's portrayed in the first part of the videotape which Kevorkian submitted to 60 Minutes. That's a separate count that occurs on September 16th.

On September 17th Kevorkian returns to Tom Youk's house and kills him by injecting first secobarbital, and then Anectine, and then potassium chloride, and he does that with the intent to stop Tom Youk's heart. He hooks up an EKG to him specifically to tell when the heart has stopped because that's exactly what he contemplates doing. That's exactly what he contemplates the potassium chloride to do.

[18] And that's exactly what any medical person, including Kevorkian, will tell you, that potassium injected in that amount directly into the vein, that's the only effect that the potassium chloride can have, is to stop the heart. That's clearly his intent there is to kill Tom Youk. So those two counts are written in the alternative.

Now Mr. Gorosh says that the participation, the participating prong of the assisted suicide statute applies to what Kevorkian does on the 17th, but that prong says that you have to participate in an act by which an individual kills himself. Clearly, even by Mr. Gorosh's own admission, Tom Youk does not kill himself, Kevorkian kills him. Kevorkian kills him by injecting the drugs. So the participation prong of the assisted suicide statute doesn't apply to what Kevorkian does on September 17th, the murder statute applies to that. That's clearly what's contemplated in the case of *People* v *Kevorkian* where the court says if you go beyond merely preparing the way, if your act directly causes the death, it's not assisted suicide, it's murder. And that's why we've charged murder here is because Kevorkian's direct act causes murder.

It's not covered under the assisted suicide [19] statute because there you have to participate in an act by which an individual kills himself. Tom Youk does not kill himself, but on September 16th he's planning to kill himself, and when Kevorkian offers him the device, or the machine, he is intending to help Tom Youk kill himself. Kevorkian then suggests to Tom Youk the direct injection and that's what the plan ultimately becomes.

But those two counts are not mutually exclusive by any means, and they're not written in the alternative, either.

Appendix 8

They're charged to cover two separate occurrences, two separate occurrences in this entire transaction. The assisted suicide count covers the planning of an assisted suicide on September 16th when Kevorkian offers the machine that will allow Youk to kill himself--clearly the intent is to help him kill himself--and the murder statute applies to the action that occurs on September 17th when Kevorkian does the actual injection, when his act itself brings about the death of Tom Youk. So these counts are not mutually exclusive. The assisted suicide statute does not speak to what Kevorkian did on the 17th, and it does speak to what happened on the 16th. So I ask that his motions be denied.

* * * *

APPENDIX 9 — EXCERPTED DISMISSAL OF COUNT III OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 12, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

DISMISSAL OF COUNT III

Before HONORABLE JESSICA R. COOPER, Judge

Pontiac, Michigan – Friday, March 12, 1999

[3] THE CLERK: Calling 98-163675-FC, People versus Kevorkian.

MR. SKRZYNSKI: Good morning, your Honor. My name is John Skrzynski. I'm here for the People.

MR. LEMISCH: Good morning, your Honor. Daniel Lemisch for the People.

MR. GOROSH: Good morning, your Honor. David Gorosh appearing on behalf of Dr. Jack Kevorkian.

Appendix 9

MR. SKRZYNSKI: Your Honor, the Court has kindly supplied us with this time. I'd like to make an official record. At this time the People would like to move to dismiss Count III of the Information which is criminally assisting a suicide, and I am doing that for the record. We will not proceed on that count. We will leave the other two counts in place and proceed on the first degree murder charge and on the delivery of controlled substance charge.

* * * *

APPENDIX 10 — EXCERPTED TRANSCRIPT OF PROCEEDINGS OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 19, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

HEARING

Before HONORABLE JESSICA R. COOPER, Judge

Pontiac, Michigan – Friday, March 19, 1999

* * *

[12] MR. GOROSH: Did you come to any conclusions with regard to whether or not you're going to suggest to Dr. Kevorkian in all or nothing proposition or shared responsibility?

THE COURT: Case law, I believe under *People* v--I don't have it in front of me, the one that came-right after *Anderson*. There's a line in there that says all or nothing at all, folks.

MR. GOROSH: That's good information to have.

THE COURT: That's what the case law says. Bring me the black bag by my desk and I have it in there.

MR. GOROSH: I do have one case that I pulled. It's *People* v *Ramsey*. I don't know if you've had a chance to take a peek at that case.

THE COURT: What's the year on it?

MR. GOROSH: It's 1979, 89 Mich App 260.

THE COURT: That won't help you because the case that am citing is, I believe, 1996--'96 is *Anderson* and '98 is the one that I will cite to you.' Or maybe it's [13] in Anderson, which is '96.

MR. GOROSH: Well, Ramsey was suggesting that a defendant doesn't have the right to a shared responsibility, but in the footnote' it says, "Although a situation might be appropriate in some cases, the administrative difficulties inherent in such a scheme are apparent," which is suggesting sure, it's not the easiest thing in the world to do and there isn't a right to do it, but it's discretionary.

THE COURT: I'm trying to see where this is. I just want you to understand what the case law is. I've been taking stuff home, you know, every night.

MR. LEMISCH: We appreciate that, Judge.

MR. SKRZYNSKI: We won't do this again, Judge.

Appendix 10

THE COURT: It's from *People* v *Adkins* after remand.

MR. GOROSH: Do you have the cite on that, Judge?

THE COURT: It's 452 Mich. 702 at page 720. They talk about Faretta and under the Sixth Amendment and defendants are also explicitly afforded the right to proceed in propria persona by the Michigan Constitution and State statute. This court, however, has found that a defendant has either a right to counsel or a right to proceed in--I say pro per, but not both. That's the phraseology of the Michigan Supreme Court in 1996.

[14] MR. GOROSH: Okay. I'm wondering, though, if the court is talking about shared responsibility or the right to appointed counsel versus the right to self representation: Some of the cases--

THE COURT: I'm telling you no ifs, ands, buts or maybes. It's all or nothing at all.

MR. GOROSH: I can say on the record that it's my belief that Dr. Kevorkian will say he's going to conduct the trial in its entirety on his own in pro per.

THE COURT: Well, I have to make the inquiry. I'm required to make an inquiry and a determination of his waiver, of his competence and whether or not it fits into the Adkins and Anderson criteria.

MR. GOROSH: I understand. When is that--is that something that we would do as a housekeeping matter--

THE COURT: At the beginning of trial.

Appendix 10

MR. GOROSH: --Monday first. Okay.

THE COURT: So prepare an opening statement because I don't necessarily believe that that may be his decision or mine.

MR. GOROSH: Well, all right. I understand.

* * *

[21] MR. GOROSH: Certainly. As it relates to the medical witnesses I supplied Mr. Skrzynski, just this morning as I received it, medical.records that we went ahead an ordered and those individuals would discuss--the medical witnesses would discuss obviously the medical condition and that is contingent, I would assume, somewhat on the Court's reconsideration opinion.

There is a possibility, your Honor, after cross examining Dr. Dragovic that I would renew a motion to introduce some medical testimony because I believe that we will be able to elicit through Dr. Dragovic's testimony and the fact that he put on the death certificate ALS is a contributing cause of death that perhaps the medical testimony will become relevant at that time. I certainly--and it's also my contention and I'll--

THE COURT: That would be interesting.

MR. GOROSH: --indicate to the Court that I have talked to a very infamous and famous medical examiner locally--

THE COURT: I can't imagine who it--what name that [22] might be.

MR. GOROSH: --and that individual has informed me that that is exactly why that has been placed on the death certificate and we believe Dr. Dragovic will have--

THE COURT: We might--I didn't see him on the list, though.

MR. GOROSH: No. We don't need to call him for that purpose. I think Dr. Dragovic will have to admit that that's why that was placed there and I would assume--

THE COURT: Depending on his testimony, that you may have medical testimony in terms of contributing to?

MR. GOROSH: The ALS is listed as a contributing cause of death on the death certificate and actually, Judge, that was in our original motion although we didn't dwell on that point.

THE COURT: What about--okay.

MR. GOROSH: And so that's one of the, I think, fundamental reasons why that testimony should be introduced. I talked at length with the forensic pathologist about this. That's in fact the reason it's there. On cross-examination I expect that will pan out, as well.

As it relates to the Youks, regardless of what [23] happens, Melody and Terry Youk can certainly testify as to mens rea of the defendant in general, not necessarily going into the background--

THE COURT: The mens rea of the defendant?

MR. GOROSH: Well, the state of mind. They interacted with Dr. Kevorkian, they certainly would have relevant testimony with regard to what he did and said to them. That would be relevant to a jury as to determine whether or not he had the requisite intent to kill or some other indication. That's certainly relevant.

And if in fact this Court were to say that I couldn't get into any medical testimony, I wouldn't ask them questions like that. I would limit my questions to only questions that are relevant to the central issue and they could testify to that.

THE COURT: And the hospice--

MR. GOROSH: The hospice individuals, that would be the focus of that inquiry as well. We would not get into any of the surrounding medical testimony with the hospice individuals. . . .

* * *

[33] MR. SKRZYNSKI: Well, he's got a neurologist, a couple of neurologists listed and a gastroenterologist. Those people are not pathologists and they're not going to testify about pathological findings, they're going to start testifying about the clinical effects of the disease on the patient, for example, the fact that the person can't move or that he can't talk or that he chokes on his own spit, for example, and that's what we're going to get into with testimony by clinicians.

THE COURT: Only about cause of death would be relevant, and he has an absolute right to cross examine him on the cause of death.

Appendix 10

MR. SKRZYNSKI: I understand. But what I am suggesting--

THE COURT: He's got a defense to pursue.

* * * *

APPENDIX 11 — AFFIDAVIT OF RUTH HOLMES, CDE DATED MAY 21, 1999

STATE OF MICHIGAN

IN THE COURT OF APPEALS

ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Court of Appeals Case No.
Lower Court Case No. 1998-163675-FC
Hon. Jessica Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

JACK KEVORKIAN

Defendant.

AFFIDAVIT OF RUTH HOLMES, CDE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Ruth Holmes, having first been duly sworn, deposes and says:

1. I served as a jury consultant on behalf of Defendant, Dr. Jack Kevorkian ("Kevorkian"), in the instant action as well as in connection with prior trials involving

Dr. Kevorkian. I am also a handwriting and document examiner, and I am a resident in the County of Oakland, State of Michigan. My roles in such capacities include, without limitation, examining handwriting and body language.

2. I submit this affidavit in support of Defendant, Dr. Kevorkian's Motion for New Trial pursuant to MCR 6.431 on the grounds of ineffective assistance of counsel. I have personal knowledge of the facts and information set forth herein, and I am competent to testify thereto if called as a witness at an evidentiary hearing or otherwise.

3. At the outset of the case, Dr. Kevorkian indicated that he intended to present the defense to the jury, and that, David Gorosh, Esq. ("Gorosh") would serve as his lead defense trial counsel in the capacity of an advisor. Dr. Kevorkian also made it clear that he felt comfortable with Lisa Dwyer, Esq. ("Dwyer") serving as co-counsel to Gorosh in an advisory capacity, but that he did not want any other lawyers working on his matter without his express consent.

4. Although Gorosh and Dr. Kevorkian met on occasion to discuss the case and prepare for trial, Gorosh simply assured Dr. Kevorkian that everything was being handled.

5. As time progressed, Dr. Kevorkian agreed to allow Gorosh and Dwyer to present the defense to the jury, however, after a heated exchange just prior to the commencement of the trial, Dr. Kevorkian indicated that he would be presenting the defense to the jury and Gorosh and Dwyer would serve in an advisory capacity only. The heated exchange involved Gorosh's open defiance of Dr. Kevorkian's instructions that a certain young lawyer could not be on the defense team, could not participate in any aspect of the defense and should not attend defense team meetings. Notwithstanding

Dr. Kevorkian's explicit instructions, Gorosh had invited the young lawyer to participate in preparing the defense, had promised the young lawyer that he could sit at counsel table during the trial and brought the young lawyer to a defense team meeting the weekend before trial was scheduled to commence.

6. Inasmuch as Gorosh had also openly defied Dr. Kevorkian's instructions not to file a motion to quash the criminal assistance to suicide count, Dr. Kevorkian stated that he began to feel that he could not trust Gorosh.

7. After Dr. Kevorkian made it clear that Gorosh would not be presenting the defense to the jury, Gorosh's attitude worsened. It appeared as if he was withholding assistance as a legal advisor that he knew Dr. Kevorkian needed and wanted in an effort to cause Dr. Kevorkian to feel so frustrated and helpless that he would turn over the case to him.

8. During the trial, I observed the body language of many of the individuals present in the courtroom, including Gorosh. I was surprised to observe that Gorosh was frequently shaking his head, making hand gestures and remarks about Dr. Kevorkian's presentation while Dr. Kevorkian was actually making his presentation to the jury.

9. On several occasions, I cautioned Gorosh to refrain from shaking his head, making hand gestures and making any comments about Dr. Kevorkian's presentation because I was concerned that Gorosh's behavior might have a negative impact on the jury. It was my belief that Gorosh's behavior could have been interpreted by the jury as a lack of confidence in his client, as well as affect Dr. Kevorkian's credibility with the jury.

10. Throughout the trial preparation, it became apparent that Gorosh had become more and more independent, frustrated with and less able to communicate with his client, Dr. Kevorkian. His main focus became the media rather than providing advice and adequate preparation to Dr. Kevorkian. I believe that Gorosh's priorities became confused to the detriment of the client, Dr. Kevorkian.

11. Based upon my observation, Gorosh appeared to be unable or unwilling to give the legal advice during the trial that was necessary for Dr. Kevorkian to adequately present a defense. In fact, I was surprised that Gorosh instructed Dr. Kevorkian to call Mrs. Youk to the stand since he had not provided Dr. Kevorkian with any meaningful assistance or legal arguments to support her being called as a witness.

Further deponent sayeth not.

s/ Ruth Holmes
Ruth Holmes, CDE

s/ [illegible]
Notary Public

APPENDIX 12 — EXCERPTED TRANSCRIPT OF PROCEEDINGS OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 22, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

JURY TRIAL – VOLUME I OF IV

Before HONORABLE JESSICA R. COOPER,
Judge, and Jury

Pontiac, Michigan – Monday, March 22, 1999

* * *

[8] THE COURT: And you say that you've planned this all along, to represent yourself?

DR. KEVORKIAN: Yes.

THE COURT: Why is that? You plan to represent yourself in the courtroom?

DR. KEVORKIAN: Yes.

THE COURT: Your attorneys did, in fact, represent you through some of the legal arguments?

DR. KEVORKIAN: Yes.

THE COURT: And you, again, put forth one of your own legal arguments?

DR. KEVORKIAN: Yes.

THE COURT: Is there--is there a specific reason that you wish to represent yourself?

DR. KEVORKIAN: Yes.

THE COURT: What is that, sir?

DR. REVORKIAN: There are certain points I could bring out better than any attorney. Certain questions I can ask that are more pertinent.

THE COURT: To certain witnesses?

DR. KEVORKIAN: Yes. If we can bring on certain witnesses that I would like on, it would be even [9] better, but I cannot.

THE COURT: Sir, do you understand that jury selection and opening statements and closing statements, you're bound by the rules of this Court?

DR. KEVORKIAN: Yes, and they're very restrictive. I understand that.

THE COURT: And you still are prepared to go forward?

DR. KEVORKIAN: Yes, within the restrictions set down by the Court.

THE COURT: And you believe that you can do that?

DR. KEVORKIAN: I'll try. I don't know if anybody can within such restrictions.

THE COURT: Do you understand, sir, that if you make a record, all right--everything that you say and every record that you make is permanent. And that means that if something happens during this trial--if there is a mistrial and a second trial, if the appellate courts disagree with me and there is another trial--everything that you say in this trial will bind you?

DR. KEVORKIAN: Yes. I plan to say nothing but the truth.

THE COURT: Do you understand that that can be used for impeachment purposes?

[10] DR. KEVORKIAN: Yes. As long as it's the truth, and it can be used for impeachment purposes, one can't argue.

THE COURT: And do you understand-that certain things can be interpreted as admissions and admissions against self-interest?

DR. KEVORKIAN: Yes, I understand. As long as it's truthful.

Appendix 12

THE COURT: And this is what you wish to do?

DR. KEVORKIAN: Yes. I hope the truth is bilateral. That's the important thing.

THE COURT: Do you understand that--and are you willing to work with counsel, at least to have them at the table to aid and assist you in the Rules of Evidence?

DR. KEVORKIAN: Yes. If they're permitted, I welcome them.

THE COURT: They can't--if you waive, it has to be an unequivocal waiver. Do you understand that?

DR. KEVORKIAN: As advisers?

THE COURT: As advisers. Do you understand case law says you either waive or you have an attorney?

DR. KEVORKIAN: Yes. In other words, they cannot be at the table with me?

THE COURT: They can be at the table to consult [11] with you, but they can't get up and speak.

DR. KEVORKIAN: No, I said as advisers, consultation and advice. That's what I meant.

THE COURT: And that's what you wish to do?

DR. KEVORKIAN: Yes.

THE COURT: You're aware of all of these dangers?

DR. KEVORKIAN: Very much so.

THE COURT: You understand we're talking about something that could carry a sentence of life imprisonment without any possibility of parole?

DR. KEVORKIAN: Yes.

THE COURT: And do you understand that you may not disrupt or inconvenience the Court?

DR. KEVORKIAN: I'm here by my own invitation. I'll act like the guest I am.

THE COURT: And that means you will follow my orders and procedures?

DR. KEVORKIAN: As a guest.

THE COURT: Well, it's more than a guest. You're here as a defendant, sir.

DR. REVORKIAN: But as a guest, propriety will be observed.

THE COURT: Has anyone promised you or threatened you in any way that makes you want to do this?

DR. KEVORKIAN: No, not at all. It's my own free [12] will.

THE COURT: Then I'll accept your waiver as freely and voluntarily given. The Defendant has been advised of the dangers and the disadvantages of self-representation. He has indicated to this Court that he will not disrupt or unduly

inconvenience this Court. He has been advised of the charge and the maximum of the sentence. He has been offered the opportunity to consult with counsel and he has accepted that. I'll accept his waiver as unequivocal.

MR. LEMISCH: May I add one thing, Your Honor?

THE COURT: Mr. Lemisch?

MR. LEMISCH: Although it may seem less of a point at this moment, I believe the Court also has to advise Dr. Kevorkian that he's also charged with delivery of a controlled substance which carries a maximum penalty of seven years in prison.

THE COURT: That is true, sir.

DR. KEVORKIAN: I'm aware of that.

THE COURT: And do you understand--

DR. KEVORKIAN: Very much so.

THE COURT: Could I finish my sentence?

DR. KEVORKIAN: Oh, I'm sorry.

THE COURT: Do you understand that you're charged with delivery of a controlled substance?

[13] DR. KEVORKIAN: Yes.

THE COURT: And do you understand that that is punishable by a prison sentence?

DR. KEVORKIAN: Yes.

THE COURT: Up to seven years?

DR. KEVORKIAN: Yes.

THE COURT: All right. Thank you.

We are going to begin a process of jury selection and that means I need space in the courtroom. And while I welcome the public and it's an open forum, I have 80 jurors coming in here and you can see I have a limitation of seating, so I'm going to ask that the deputies clear the courtroom so that we are very limited in space and as soon as the jury pick is over we're going to take out those seats on the side and we're going to be able to have the public in here, but until that it's my understanding that there will be audio that will be played out in the hallway and there is another room downstairs.

Have you read all of the orders that I've made?

DR. KEVORKIAN: Yes.

THE COURT: You're familiar with what voir dire is, sir?

DR. KEVORKIAN: Yes.

THE COURT: And you know that the Court will [14] conduct the voir dire?

DR. KEVORKIAN: Yes.

THE COURT: All right.

Appendix 12

MR. GOROSH: May I?

THE COURT: It will be on the record, now. I can't--I can't--I can't do anything off the record at this point, and I don't wish to do anything off the record.

MR. GOROSH: I understand. I just wanted to understand how to explain to him how to proceed as it relates to the cause jurors.

THE COURT: If he wishes to change his mind, he ought to do so right now.

MR. GOROSH: All right.

MR. LEMISCH: Your Honor, if I may, I know the Court hit all of these points, but under *People* v *Anderson* I think the Court has to actually say that it finds as a fact that the defendant's request to represent himself is unequivocal, knowing, intelligent and voluntary, and I know you found the factors for all of those, but I'm not sure you actually said the words.

THE COURT: Actually, Adkins says that it can be in a more informal manner, but I have made a finding that the defendant has made a knowing and voluntary waiver.

[15] MR. LEMISCH: Knowing, intelligent and voluntary.

THE COURT: And intelligent waiver.

MR. LEMISCH: Thank you.

THE COURT: Anything else you want?

MR. LEMISCH: And that it was unequivocal.

THE COURT: It is unequivocal, is it not, Dr. Kevorkian? You aren't going to change your mind?

DR. KEVORKIAN: I don't think there's a stronger word.

MR. LEMISCH: Thank you.

THE COURT: Dr. Kevorkian, can I have a copy of the witness list?

MR. GOROSH: Of the witness list? Certainly.

THE COURT: Sir, Dr. Kevorkian is going to take over so it's not going to necessarily be you responding.

MR. GOROSH: Okay. I'm sorry, Judge. I'll get used to it.

* * *

[237] THE COURT: And your attorneys have advised you of the manner and the nature.in which an opening statement should be conducted?

DR. KEVORKIAN: Yes.

THE COURT: And what the purpose of that statement is. Are you comfortable with that, sir?

DR. KEVORKIAN: Yes.

Appendix 12

* * *

THE COURT: Now, in this case the defendant is representing himself. This fact should not affect your decision in any way. The defendant has the right to represent himself and he has chosen to exercise that right, and a lawyer is present if the defendant wishes to consult with him. As a matter of fact, there are two lawyers present if the defendant wishes to consult with him or her.

* * *

[268] THE COURT: All right. You're going to be able to argue facts as opposed to law?

DR. KEVORKIAN: Oh, yes. Yes.

THE COURT: And is it clear and you understand the difference between a legal argument and a factual argument?

DR. KEVORKIAN: Yes.

THE COURT: Do you need any help or time to with your attorney so that--or are you prepared to go forward?

DR. KEVORRIAN: No, everything is fine.

THE COURT: They're right there looking at you, willing to talk with you and to explain it with you.

DR. KEVORKIAN: I've got their help.

Appendix 12

THE COURT: He does, he--really, he wants to talk to you. But you don't want to do that?

DR. KEVORKIAN: I've got it. . . .

* * * *

APPENDIX 13 — EXCERPTED IN CHAMBERS PROCEEDINGS OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 23, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

IN CHAMBERS PROCEEDINGS

BEFORE HONORABLE JESSICA R. COOPER, JUDGE

Pontiac, Michigan – Tuesday, March 23, 1999

* * *

[12] DR. KEVORKIAN: Well, I personally can't do it because evidently the nuances are too fine and I don't understand. I'm not trained in law and I thought my advisers could tell me and I was reading what they wrote.

THE COURT: But it's hard for them, because they're scribbling on a piece of paper--

DR. KEVORKIAN: Right.

Appendix 13

THE COURT: --and then you're reading the piece of paper--

DR. KEVORKIAN: That's right.

THE COURT: --and then it's coming--which is why I keep trying to explain to you that you have the Sixth Amendment right that you should and could assert at any time.

DR. REVORKIAN: I can only do what the advisers tell me if I'm the spokesperson because I'm representing myself. They have to funnel it through [13] me, I guess, and I'm trying the best I can.

MS. DWYER: How about through a trial memo that we could submit tomorrow to the Court and to the prosecutor?

MR. GOROSH: With permission of the Court, even talk, if my client would let us. It's not a typical scenario we're all sitting here engaged in.

MS. DWYER: But by way of a trial memo, though, we could advise Dr. Kevorkian of nuances more than spontaneously and he could submit a draft to the Court.

THE COURT: I technically can't do anything. You could do what you wished as advisers to him, between you and him.

DR. KEVORKIAN: You know, Your Honor, you ought to do just what you want to and have to do, with a clear conscience, please. Don't agonize over this.

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* * *

[25] MR. GOROSH: Judge, that being said, then we would ask--I suppose we don't have much more time left today anyway--we would ask at least an opportunity to submit through Dr. Kevorkian, as an in pro per defendant, a memorandum. It certainly could be given to the prosecution by morning so that they can review. It"s a short issue, it's not complex.

THE COURT: Well, what he does in terms of his consultation with you is his business.

[26] MR. GOROSH: Okay.

THE COURT: And what he chooses to adopt under his own signature is his business. If that's what he chooses to do, that's what he may do. He may choose not to, he may choose to. He may do whatever he chooses to do, but I want to provide him with the opportunity to consult with you and to continue to consult with you and if he chooses to submit that memorandum, that's his choice. If he chooses not to, that's also his choice.

DR. KEVORKIAN: I've just been handed something I could read, to ask for an opportunity to brief the issue of Melody and Terrence Youk's testimony for the Court and submit it tomorrow afternoon.

THE COURT: That's a good idea. Okay. Then you can do that.

DR. KEVORKIAN: If I came up tomorrow afternoon--

MR. SKRZYNSKI: Tomorrow morning.

THE COURT: How about tomorrow morning so that I could have an opportunity to review it and not into the middle of the night.

DR. KEVORKIAN: What time?

THE COURT: Would it be possible to present--I'll be in motion call. Would it be [27] possible to present it by nine o'clock tomorrow morning?

DR. KEVORKIAN: By nine?

MR. GOROSH: Could you give us until ten?

THE COURT: I'm going to need a response and then I'm going to need to be able to do my own ruling which means if I get it by nine he may have a very short period of time to respond--

MR. GOROSH: I understand.

THE COURT: --because I'm .going to need it before lunch so that I can get on the computer or into the books.

DR. KEVORKIAN: By nine.

MR. GOROSH: We'll do it.

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APPENDIX 14 — EXCERPTED TRANSCRIPT OF PROCEEDINGS OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED MARCH 25, 1999

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

v

JACK KEVORKIAN,

Defendant.

JURY TRIAL – VOLUME III OF IV

Before HONORABLE JESSICA R. COOPER,
Judge, and Jury

Pontiac, Michigan – Thursday, March 25, 1999

[3] THE CLERK: Calling 98-163675-FC, People of the State of Michigan versus Jack Kevorkian.

MR. SKRZYNSKI: Good morning, your, Honor. My name is John Skrzynski. I'm here for the People.

MR. LEMISCH: Good morning, your Honor. Daniel Lemisch for the People.

DR. KEVORKIAN: Good morning. Dr. Kevorkian, pro se.

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THE COURT: Do you wish us to wait for Mr. Gorosh? Is he absent for some reason?

DEPUTY: I believe he's just down the hall, your Honor.

THE COURT: All right. Then we'll wait for him.

The record should reflect that I am and have received the memos from both the People and the Defendant and I can only assume that the attorneys who aided and assisted, or if they aided and assisted, are constrained under the theory of the case. And I think I need to go back to square one and I'll go through this item by item.

* * *

[6] they have a full record on which to make a determination and I think that that perhaps is the best that we can do here.

But as I said, I'm the referee. I can't tell you what theory to put forth, I can't tell you how to get certain information in, I can only respond to an objection, allow you to respond to it, and make a ruling. So do you wish to make a Special Record with Mr. York (sic)?

DR. KEVORKIAN: Your Honor, my offer of proof for Terrence Youk would be the same as for Melody Youk.

THE COURT: Identical?

DR. KEVORKIAN: Yes. . . .

* * *

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[19] MR. SKRZYNSKI told you that Jack Kevorkian killed Tom Youk by injecting him with some drugs and that those actions gave rise to two counts. Count I is first degree murder and Count II is delivery of a controlled substance. Now as to Count I, the judge is going to tell you that you have some choices. You have some choices besides first degree premeditated murder. You will also have the option of choosing second degree murder or the option of involuntary manslaughter.

* * *

[25] But we know he goes over there and he videotapes it. And he videotapes it for a very specific purpose. He's videotaping this killing because he knows that one day we're going to be in a courtroom just like this and you're going to be looking at it, because he took that videotape to CBS and they broadcast it on 60 Minutes and we'll discuss why he did that in a second. But remember that what he does on this videotape, it is very clearly in his mind what it's going to be used for. It's going to be used in a trial because that's what he intends to provoke here.

So he's got Tom Youk sitting in a wheelchair, he's got the worst case scenario. He's got (a) a person with ALS, he picks that person. He has Tom Youk sitting in a wheelchair and he asks Tom a series of questions. And when you think about--when you look at the tape and you look not at what Tom Youk is doing but what Jack Kevorkian is asking him, look at the minimum kind of information that Jack Kevorkian is getting from [26] Tom Youk. Look at how very, very little Jack Kevorkian finds out about Tom Youk the man, the person. Among other things, he never asks him how do you feel, how does it feel to be there, tell me about it.

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He doesn't do anything like that. He asks some perfunctory questions about the onset of Tom's ALS. He spends a lot of time talking about the Porsche, the car, the race car. Very, very little information about Tom. And all of these questions are leading to the grand moment when Dr. Kevorkian gets Tom to sign the consent form. He signs a consent form. And when he signed the consent form--this goes on--what I'm showing you here are portions of the transcript which you had in your hands when the tapes were playing. You will be able to take your copies into the jury room and look at them, so I'm going to point out to you portions of the transcript rather than replaying some of the tape.

He talks to Tom and says, right here (indicating), "I'm going to have you sign a that, that, you, you consent to a direct injection instead of using the device, the machine. Is that alright with you?" And then down here when he's actually reading the consent he says, ". . . you have chosen direct injection, or what they call active euthanasia. . . ."

* * *

[30] going to cause a murder charge, it's going to create a trial. And it's going to bring an issue that ought to be in front of all the people of this state, for debate among everybody, it's going to bring that issue out into this courtroom onto your shoulders. That's what he wants.

We know that after he signed the consent form Dr. Kevorkian got Tom to agree to put off--it's interesting. He tells him you want to put this off, you want to put this off? He says, Do you want to wait a month? Do you want to wait two weeks, do you want to wait a week. And it's interesting. He tells him that after he has gotten him to sign

the consent form, after he's in the bag. He's now said well, wait a minute, I don't want to rush you into this. You want to wait a month to do this, you want to wait a couple of weeks?

Now why is he saying that to Tom? To give Tom some time to reconsider his decision and maybe seek some help, maybe he's depressed. Maybe some treatment for depression might alleviate any kind of suicidal thoughts that he's got. Does he tell him to do that? He tells him to do that because he says he knows that one day this videotape is going to viewed by people like you and then he can get up and say see, I tried to talk him out of it. I tried to tell him to take his [31] time. Don't forget, this entire thing is orchestrated. He knows exactly what he's doing when he films this.

Now we know that he was supposed to wait--supposed to wait for a week, but this is where he calls--he tells Mike Wallace--this is a transcript from the 60 Minutes program, and he tells Mike Wallace, "But I got a call the next night from his brother saying, 'Tom wants it now'". So Dr. Kevorkian goes back to Tom's house the next night, now it's September 17th, and he videotapes this, too. He videotapes this part. And the first thing that happens when Dr. Kevorkian comes in--remember the tape. Do you remember what happened? The very first thing that happens is he's got the equipment with him. He's brought some equipment, some very elaborate equipment. He says, ". . . you know, Tom, this time that we're gonna, we're gonna inject you in the vein, it's quicker." And then he says, ". . . now I'm gonna put on a cardiogram so we know when your heart is stopped, okay."

He's brought along a special machine, and you see it in the videotape. It's a pretty large piece of equipment sitting on the table next to Tom. It's a machine that's designed to

monitor the heart, as Dr. Kevorkian says, so we know when your heart is stopped. That reflects the intent to kill. And he's brought [32] equipment with him. Obviously this is a premeditated and deliberated act. He's got this so he can tell not if the heart stops but when your heart is stopped, because he knows exactly what he's about to do.

Now he starts to inject. He says we're going to inject you in your arm. Before he did this--you remember, before he did this the next thing he did after he hooked up the EKG was to start looking for a vein in Tom's left hand. Do you remember that? And he pokes around and fumbles around for a long time looking at Tom's left hand for a vein. At one time he pokes Tom and Tom cries out in pain, he says ow. And then Dr. Kevorkian straddles him over his wheelchair and works on him trying to get--trying to get the I.V. into him. And finally he turns off the videotape, and the videotape is off and we don't know how long it's off and we don't know how--what Dr. Kevorkian is doing in the meantime, but suddenly the videotape goes back on and now the I.V. is in Tom's right hand.

Dr. Kevorkian knows that this videotape is capturing all of the time it's taking and the pain he's causing Tom, and he knows that. He turns the videotape off and he goes back to work, apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the [33] time? He goes back and puts it in Tom's right hand and at some time later, we don't know how long that is, now it's in Tom's right hand. "We're gonna inject you in your right arm. Okay?" Then he say's you'll go to sleep fast now.

Now I'm showing you this because when you look at the videotape you can't see exactly what Dr. Kevorkian is

doing at this point on the tape. His back is to you and he's covering up Tom. What he's got is a syringe full of Seconal, which is secobarbital, and he's injecting that. And we know from Dr. Dragovic's testimony that Seconal is a sedative, it makes you go to sleep. So we know from--we can infer from what he's saying here, you'll go to sleep very fast now, and what he's injecting is the Seconal.

As a matter of fact, after Tom dies and he's taken to the M.E.'s office and some of his blood is removed and sent to a toxicology lab--this is part of Exhibit No. 6, this is the toxicology report. And what it says is in the blood was found a high level of secobarbital. After Tom's blood is analyzed, secobarbital is found in the blood. So we know that that's what Dr. Kevorkian is doing. And what's more, what he's got is a syringe which is already prefilled with the drug. It's prefilled.

[34] Now this injection right here gives rise to Count II of the charges, the delivery of a controlled substance. You heard testimony that secobarbital, which the trade name is seconal, is a controlled substance. The elements of the crime of delivery of a controlled substance are, first of all, that Dr. Kevorkian delivered a controlled substance to Tom Youk. In this case he delivered it by injecting him with it. Secondly, the controlled substance was secobarbital--there it is right there--taken from Tom's blood. And the third element is that Dr. Kevorkian knew that he was delivering secobarbital to Tom Youk. Quite obviously if he knows that, he knows it's going to put Tom to sleep. He tells him that. Those are the three elements of delivery of a controlled substance. That's all. That's all the elements of delivery of a controlled substance. That's it right there.

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But he doesn't stop, he continues to inject. When he injects after he has convinced himself that Tom is asleep, he continues the injections. This is the last page of that first transcript. He says, "And now we'll inject the Anectine." This is to the camera. Now Tom's asleep. Tom is sleeping. He can't hear anything Dr. Kevorkian is saying. Why is Dr. Kevorkian announcing now to the camera, "Now we'll inject the [35] Anectine"? Because he's very conscious of the fact that he's going to have an audience for this videotape That's the whole reason for the videotape. "Now we'll inject the Anectine."

And we know now that Anectine is a muscle relaxer, it paralyzes all of the skeletal muscles in the body, including those muscles which control breathing. So we know that he injects that in Tom, and you see Tom kind of flop backwards because now his muscles won't hold him up any more. His head kind of droops back and his mouth kind of hangs open. The paralysis is setting in, including the paralysis in his lungs so that he can't--and the muscles around his lungs and his diaphragm so that he can't breathe.

Then Dr. Kevorkian says, "Now the Potassium Chloride". And you remember the testimony from Dr. Dragovic about the potassium chloride. Potassium and chloride are naturally produced in the body and they can be used if you get dehydrated. That's one of the parts of the drip that they use to rehydrate you, it's one of your electrolytes, but it's used therapeutically when it's used in a controlled drip. Dr. Dragovic says when it's pushed I.V., like Dr. Kevorkian is doing on the film with Tom Youk, it has only one effect and that effect is to disrupt the electrical activity of the [36] heart so that the heart is not beating properly, it stops to spasm or fibrillate, and eventually it stops. And sure enough, the heart stopped.

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Incidentally, Dr. Kevorkian now even announces the fact that two minutes ago he injected Seconal so he admits it right there if we didn't know that already. But he says, "The Potassium Chloride will stop the heart." And sure enough, that's exactly what happened, the potassium chloride stops the heart. He knows exactly what's going to happen when he does this, when he injects each one of those three drugs. The whole purpose of injecting those three drugs is to kill Tom Youk.

As a matter of fact, when he gets--now he takes the tape, this tape that he's made. Now he takes that and he gives it to CBS, to 60 Minutes. And the first thing that Mike Wallace says to him is, "You killed him". And he says, "I did, but it could be Manslaughter not Murder. It's not necessarily Murder."

You know, at the beginning of this case he got up and made his opening statement and he told you in the opening statement that, you know, I certainly wasn't committing a crime. I wouldn't have gone on national television committing a crime, yet he's saying it could be manslaughter, not necessarily murder, it could be [37] manslaughter instead. That comes from his own mouth. He knows that what he has done is kill a man, and he knows that the law says you can't kill, don't do it. That's the first thing that he says to Mike Wallace.

Mike Wallace then asks him:

W "Did Tom know that. you were making, in effect, an example of him?

K "Yes. And, and I sensed some reluctance in him, I, I did.

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W "Because he thought he was getting assisted suicide?

K "Ya, that's right. And, an actually this is better than assisted suicide. I explained that to him. It's better control."

But Tom Youk didn't have any control at all. He means it's better control for Jack Kevorkian. Tom Youk was out of control. It was Jack Kevorkian at the control once the injections started. Tom couldn't move.

Dr. Kevorkian tells Mike Wallace he was very afraid of choking to death and he must have--he must have felt that he was on the verge of it. Yet you're going to look at that scene, I'm going to show you that scene in just a few minutes, and you look at that tape [38] to see if there's any evidence of him choking or him being afraid of choking. This is supposedly the rationale why he did this.

Now he narrates. When you look at the 60 Minutes tape you'll see that they're watching monitors and they're watching Dr. Kevorkian's tape, and Dr. Kevorkian starts to narrate to Mike Wallace exactly what he's doing. And we know that he's injected the Seconal, the sleeping drug, and now he's injecting the second drug and Mike Wallace says, "And this--" and Dr. Kevorkian says, "Paralyzes the muscles". ". . .there's a lack of oxygen's getting to him now . . . ." ". . .he's dying now, cause his oxygen's cut off, he can't breathe. So now I'll quickly inject the potassium chloride to stop the heart." He's narrating this to Mike Wallace. He's telling him exactly what's going on in Tom Youk's body. The man who was afraid of choking to death is now suffocating to death. Of course, Dr. Kevorkian says he's asleep, so it doesn't make any difference.

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And it's interesting, ladies and gentlemen, that he has his first meeting with Tom Youk on the 16th at around ten o'clock in the evening, and on the 17th at around ten o'clock in the evening Tom is dead. He knows Tom Youk for less than 24 hours--just a few [39] minutes, really--before he kills Tom Youk. That's all he knows about Tom Youk.

Then he tells Mike Wallace--he injects the potassium--he's dead. Mike Wallace says, "He's dead." Jack Kevorkian says, "Yep. The heart has stopped." "Yep. The heart has stopped." He's very conscious of what he's doing. This is very purposeful conduct. This is a methodical killing of a human being. You can't get around that.

I want to show you again. You saw what happened. I've narrated to you by using the transcripts of the-of the tapes, but this is what happened.

(Portion of tape replayed, prosecutor comments)

K Okay Tom, we're all set now. You're hooked up the EKG, and we're ready to inject. We're gonna inject you in your right arm.

Okay? Alrighty.

Remember, he's killing this man.

K Hold still. You alright?

Y Yeah.

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He's now injecting Seconal. This is a sedative.

K You'll go to sleep very fast now.

Y (unintelligible)

K You getting sleepy?

* * *

[41] It's a small thing, but you would think that he would close Tom's mouth before he started taking the tubes out. Just tells you where his focus is. It's not Tom Youk.

That wasn't a movie, that was a real human. That was a man that was just killed before your eyes. And then again on national TV. Dr. Kevorkian took the tape, took this tape to CBS, a major network, and CBS broadcast the most--one of the most intimate moments that a human being can have, the moment of their death. Broadcast to millions and millions and millions and millions of people. Why? Death with dignity. Why? Why do this?

He tells Mike Wallace this, "I've got to force them to act. They must charge me." This is the 60 Minutes tape now. Jack Kevorkian killed a man, killed Thomas Youk, and videotaped the killing and allowed it to be broadcast--offered it to be broadcast to the [42] entire United States to try to force the prosecutor to charge him--to force the prosecutor to charge him. And why? Why that? Why did he want that? Why would he want to go into court and with something like this. Well, he says--he tells Mike Wallace, "Either they go or I go. If I'm acquitted they go because they know they'll never convict me."

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They will never convict me. In the future tense, like it's going to happen again. He's making a political statement He's got a political agenda, and he killed a man to further his political agenda, to videotape it, to put it on national TV to get the prosecutor to charge him because he knows the prosecutor must charge a murder, because that's surely what this is, to go into a courtroom. Not before all the people, not before all nine million people that live in this state, not for a public debate, not so that we can all have our input, both pro and con, into this issue.

* * *

[45] That's why I tell you this is a murder trial. This is about the murder of Tom Youk, a murder that's committed to make a political statement. Is that any better than murder for hire? Is that any different than murdering somebody for money? And then to wrap it up under the guise of mercy when it's a political statement. He's willing to kill a man to make his political statement. Mike Wallace says some people call you a fanatic and he says zealot. He's a zealot and he's proud of it. He's willing to sacrifice this man for his cause, and then he puts it on you to decide the cause--you decide it.

* * *

[50] DR. KEVORKIAN: Why then? Why on the 17th of September? Why not a month earlier or three years earlier? Ask him why not earlier didn't he call me to kill him. Those are unanswerable questions. He can't answer those. Why did Tom Youk call me on the 15th of 16th? Why did he call me? Because he had--

MR. SKRZYNSKI: Well, objection, Judge. He can't testify now: He can't tell the facts now. That portion's over.

THE COURT: You have something in evidence. We don't know whether he's going to talk about what's in evidence.

DR. KEVORKIAN: He's mentioned every fact in the book, Your Honor.

MR. SKRZYNSKI: That I've proven.

DR. KEVORKIAN: Well, what did Thomas--what did you now--first of all, let's go to this again.

Can I go to the blackboard?

THE COURT: Surely. Do you want to move that?

[51] DR. KEVORKIAN: Can you see this? Can they see this?

First of all, I want to repeat that he cannot prove this, he cannot prove that, and he cannot prove that (indicating). Reasonable doubt right there.

I don't need this any longer.

THE COURT: Do you want help moving that?

Mr. Lemisch, could you put that down so that he may bring this forward?

MR. LEMISCH: Yes, of course, Your Honor.

THE COURT: We've got a little space problem here.

DR. KEVORKIAN: Simple arithmetic. You heard the medical examiner say homicide is not necessarily murder. You heard him say euthanasia is homicide. Therefore -- simple logic -- euthanasia is not necessarily murder. Simple logic. The question is asking what do you mean by not necessarily. When isn't it murder? Would he answer that? Is it murder now, when I did it, helped him out, helped Thomas Youk end his terrible state? Is that murder? You can't get beyond that. That's logic. He said this and he said that; therefore, this is true.

If it's not necessarily murder, and no one can define when it's not necessarily murder, that's more than reasonable doubt. At least I think I it is, and I [52] think any reasonable person would think it is. When you can't even define when it's not necessarily murder, it's a murky situation. In my opinion, it's never murder because the intent is different. I intended to do my duty, not to kill.

You heard the medical examiner say, oh, yes, I do the cut here when I open the body and I do the cut through the scalp. That's mutilation, isn't it? Why not a crime for the medical examiner? Why isn't he charged with mutilation of a body? Why? Because he's exempt because of his position, his profession. It's a medical service. Anybody else does that to the body, then it's a crime, a felony, but not for the medical doctor. Why is this different? He calls it a murder, a crime, a killing. I call it a medical service.

Tom Youk didn't come to me because I want to die, kill me. He came to me to say please help me. There was a medical

affliction there, affliction which we can't talk in detail about. Medical service is exempt from certain laws. The medical examiner proves this. You can't do that. If the surgeon amputates and cuts the leg off, that's mutilation. He can do it. Anybody else, that's a felony. Not because he's practicing medicine, because it's mutilation, it's mayhem. And you can't do that except if you're a doctor.

[53] I staged the whole thing. Really. I'm not much of a producer or a director in movies. We -- I wanted to protect the family from possible charges --

MR. SKRZYNSKI: Objection, objection. Again, he's testifying. He can't put facts into --

DR. KEVORKIAN: I'm trying to show why I did it.

MR. SKRZYNSKI: Excuse me.

THE COURT: Excuse me. One person can speak at a time.

MR. SKRZYNSKI: He cannot put facts before the jury which have not been proven before through testimony or other evidence. He cannot testify now.

THE COURT: Sir?

DR. KEVORKIAN: But I can testify there were no witnesses at the scene, can't I?

THE COURT: You can certainly say that.

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DR. KEVORKIAN: There were no witnesses there. Now can I say why?

MR: SKRZYNSKI: I'm objecting.

THE COURT: Well, sir, it depends on how you phrase it.

DR. KEVORKIAN: There were no witnesses there because I did not want anyone else --

MR. SKRZYNSKI: Objection

DR. KEVORKIAN: -- implicated.

[54] MR. SKRZYNSKI: Objection.

DR. KEVORKIAN: Well, that's -- can I say why?

MR. SKRZYNSRI: Judge, you know, he could have gotten on -- you know, he didn't --

THE COURT: Ah, ah, ah --

MR. SKRZYNSKI: -- he didn't -- he can't testify now. He cannot testify now.

DR. KEVORKIAN: All right. Why -- why I took so much time with the needle down here. Can I say that?

THE COURT: You can comment about what is in evidence. You can comment about what is on the tape.

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DR. KEVORKIAN: I took my time down here in this one vein, trying to get a small vein, trying to keep --

MR. SKRZYNSKI: Your Honor, I'm going to object again. He's now testifying. He's putting new facts before the jury. He can't do that.

DR. KEVORKIAN: Okay. The covering up of the needle sticks was to try to keep this--

MR. SKRZYNSKI: Objection.

DR. KEVORKIAN: Well, you talked about the needle sticks.

MR. SKRZYNSRI: You can't say -- Judge, he's giving reasons for these things. That has to come through testimony. It can't be presented through his closing argument to the jury.

* * *

[63] (Portion of tape replayed, prosecutor comments)

Did Tom Youk consent? He's injecting the Seconal.

K You'll go to sleep very fast now.

Y (Unintelligible)

What? What did he say? What?

K You getting sleepy?

Y (inaud)

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K Getting sleepy?

Y (inaud)

K Just a minute.

Y (inaud)

Just a minute. Tom's saying something. What's he saying?

Too late now. It's too late now. It's too late now. We don't know what he said. And it's too late now because he's gone now. He's asleep and he's never waking up again. What did he say? Did he say "Wait"? Did Dr. Kevorkian have the duty to stop and find out what he was saying? The last opportunity that he had to say anything before he was knocked unconscious and we don't know what he said and he didn't bother to find out, because he was on a train. He had one idea in mind. He was going to make his point. He says he has no agenda. That's the reason he killed this man, to make his point, to bring this case here.

[64] What did Tom say? What did Tom Youk say? That's why this is so dangerous. That's why this is so dangerous. He's not accountable to anybody when he does this. There is no medical board sitting there, there is nobody watching him doing this. He's not accountable to anybody. He chooses whose suffering is worth it, and that person I'll do. He's not accountable to anyone. And when he asks you to give him that power, because he is surely asking you to forget the law and give him that power, it will be an unaccountable power. You won't see videotapes any more.

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He says I keep saying it's killing. Well, what is it? What did he do to Tom Youk? Put him to sleep? He killed the man. He doesn't want to say the word, but that's what he did. He said this is the final solution for Tom--a final solution. You know, maybe there's not so much outrage because of Tom Youk's condition. He said that we didn't show much sympathy for Tom Youk. I didn't broadcast Tom Youk's death to millions of people all over the country. I didn't do that. I didn't videotape this man in his death throes. I didn't do that, he did this. Didn't even bother to close that man's mouth.

Did you hear him say anything to Tom Youk, Tom, I [65] feel badly for you, good luck to you, I'm sorry you suffered 'so much? Did he have one kind word for him? He came like a medical hit man in the night with his bag of poison to do his job.

You know, we look at Tom Youk and he's sitting in a wheelchair. And maybe Tom Youk is the kind of person that if we really--really are honest with ourselves, that person sitting in a wheelchair, maybe that's the kind of a person that we really don't have much value for, that handicapped person. Maybe that's really what's going on here. What if a mother brought her Down's Syndrome child to Dr. Kevorkian and said this child--

DR. KEVORKIAN: I object, Your Honor. I object strenuously on that statement. No one is talking about minors and no one is talking about people who can't decide for themselves.

MR. SKRZYNSKI: He's talking about euthanasia.

THE COURT: Rephrase.

MR. SKRZYNSKI: What I'm saying is are we judging him by the victim he chooses, by the person that died? If it was a different person there, if it was not Tom Youk in a wheelchair, if he had not chosen that person, could have been a person who wanted to die--he says we have the right to die. If it had been an 18-year-old [66] girl who wanted to die because she saw her boyfriend walking with her best friend and decides that she wants this over, her life's not worth living any more and she wants it over and she can exercise her right to die and she wants to give consent to do this--she has the right to die and she can give consent and he can then kill her because he's got that consent--it's the same thing. It's the same scenario, just a different victim. Would you call that murder? Would you be outraged at that? Are we simply not outraged because there is a man that maybe deep down we think maybe his quality of lie isn't so good?

Ladies and gentlemen, he's asking you--he's asking you to make progress, he says. He wants progress. He's asking you to say that what he did is all right. He's asking you to say that euthanasia is all right. And it's not. It's a crime. What he did is a murder. That's the law. But he says progress is euthanasia. Make the State policy euthanasia.

We don't know what would happen if we made the State policy euthanasia. You don't know, I don't know, and certainly you won't be able to come up with enough insight when you debate in the jury room to know what could go wrong if you made euthanasia a State policy. There are eleven million souls buried in Europe that [67] can tell you that when you make euthanasia a State policy some catastrophic things can evolve from that. We don't know what we're doing when we open up that box. That's why I'm saying don't open the box.

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He talks about the law. Even if you don't know why euthanasia is not a good thing, even if you can't remember why it wasn't a good thing, the law remembers. The law is not something that's imposed from above us and forces us to do things we don't want to do and stops us from doing things that we do want to do. The law rises up from all the people, it comes from all of us--it comes from us. It's the cumulation of all of our wisdom and all of our experience, and the law protects us. And if we follow the law, we will be safe. If you follow the law, we'll be safe.

So follow the law. Please.

* * * *

APPENDIX 15 — EXCERPTS OF DEFENDANT/ APPELLANT, DR. JACK KEVORKIAN'S, APPELLATE BRIEF DATED NOVEMBER 12, 1999

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals
Docket No. 221758
Lower Court
Case No. 98-163675-FC
Hon. Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JACK KEVORKIAN,

Defendant/Appellant.

(On Appeal from the Circuit Court
for the County of Oakland)

DEFENDANT/APPELLANT,
DR. JACK KEVORKIAN'S, APPELLATE BRIEF

ORAL ARGUMENT REQUESTED

* * *

B. *The Trial Court Erred in Denying Dr. Kevorkian's Motion for A New Trial Because the Assistance Gorosh Provided Fell Far Below The Constitutional Standards Required For Effective Assistance of Counsel.*

Dr. Kevorkian is guaranteed the right to effective assistance of counsel by both the United States and Michigan Constitutions. The Sixth Amendment to the United States Constitution guarantees an accused "the right . . . to have the assistance of counsel for his defense." U.S. Const., Am. VI. The Michigan Constitution also guarantees, "[i]n every criminal prosecution, the accused shall have . . . assistance of counsel for his defense." Const. 1963, Art. 1, § 20.

It is well-settled that the right to counsel includes the right to effective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759, 771, n.14 (1970). At issue here is not the denial of counsel, but the actual performance of counsel. *People* v. *Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

The benchmark case in Michigan describing the standards for claims of ineffective assistance of counsel is *People* v. *Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994). Michigan has adopted the federal test described in *Strickland* v. *Washington*, 466 U.S. 668 (1984), for reviewing claims of ineffective assistance of counsel. The Michigan Constitutional provision affords the same protection as the Sixth Amendment to the United States Constitution with

regard to the guarantee of assistance of counsel. *Pickens*, 446 Mich. at 302. In order to determine whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial. *Pickens*, 446 Mich at 309. The test requires the greatest level of factual inquiry into the conduct of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich at 155.

In the case at bar, Gorosh's assistance was inadequate due to numerous errors, miscalculations, and breaches of professional responsibility. The detailed information received from Dwyer, Holmes, Schwartz, and Dr. Kevorkian, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and explain why the defense presented on behalf of Dr. Kevorkian was so inadequate. The blame for the deficiencies in presenting a defense on behalf of Dr. Kevorkian falls squarely on the shoulders of Gorosh, who failed to effectively perform his dual roles as advocate and advisor, and left his client without the legal information necessary to present a competent defense.

1. *Gorosh's performance was objectively unreasonable.*

Gorosh violated the Michigan Rules of Professional Responsibility (the "Rules") during his representation of Dr. Kevorkian. The Rules detail a lawyer's duties as both advisor and advocate. As an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MRPC 1.0, *comment*. As an advocate, "a lawyer zealously asserts

the client's position under the rules of the adversary system." *Id.* A lawyer also should be competent, prompt, and diligent in all professional functions. *Id.* Defense counsel must perform at least as well as a lawyer with ordinary skill in the criminal law, and must conscientiously protect his client's interests. *People* v. *Garcia*, 398 Mich. App. 250, 264; 247 N.W.2d 547 (1976).

Here, Gorosh did not perform as well as a lawyer with ordinary skill in criminal law, and he certainly did not conscientiously protect his client's interests. As shown below, Gorosh abdicated these roles, and did not provide Dr. Kevorkian with appropriate advice or advocacy. In fact, Gorosh was at odds with his client throughout most of the representation. R., New Trial Br., Exh. A at 3. Co-counsel, Dwyer, was so concerned about the quality of representation that Dr. Kevorkian was receiving that she was hesitant to be associated with the case. *Id.* at 1.

First, Gorosh was not qualified to handle the defense of Dr. Kevorkian, who was charged with a serious criminal offense, carrying a maximum penalty of imprisonment for life. The Rules state,

A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; [or]

(b) handle a legal matter without preparation adequate in the circumstances. MRPC 1.1.

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The comment to Rule 1.1 goes on to state, "[i]n determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity . . . of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." MRCP 1.1, *comment*. Additionally, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id.*

According to co-counsel, Dwyer, and Gorosh's former employer, Schwartz, Gorosh was not competent to handle the case, nor to prepare and aid Dr. Kevorkian in presenting his own defense. R., New Trial Br., Exh. A at 2, 4-5, Exh. B at 3-6. Gorosh had minimal experience as he had only been practicing for three years. R., New Trial Br., Exh. B at 1-2. He had limited trial experience, and had never defended a felony case, much less a homicide. *Id.* Gorosh's former supervisor, Schwartz, attests that Gorosh was ill-equipped to serve as lead defense counsel in a significant murder case because of his inexperience, his inability to grasp important strategic considerations, and his failure to consider the best interests of his client. *Id.*

Indeed, the decisions and trial strategies made by Gorosh reveal his inexperience and inability to grasp important strategic considerations. For example, despite the advice of co-counsel, Dwyer, Gorosh moved to quash the assisted suicide count. R., New Trial Br., Exh. A at 2, Exh. C at 3. While the Trial Court dismisses this claim as without merit

because the Prosecution ultimately dismissed the assisted suicide charge on their own motion, Gorosh's action was precisely what brought this to the Prosecutor's attention. R., New Tr. Br., Exh. B at 3-4. The Prosecution had in fact argued to retain the assisted suicide charge until Gorosh's decisions caused the consequences of such action to become clear to them. March 3, 1999 Tr. at 15-19. Gorosh did not even understand why the Prosecution would choose to proceed only with the murder charge. *Id.* at 13. Acting against the advice of co-counsel, Dwyer, and the stated wishes of his client, Gorosh insisted on going forward with the motion to dismiss the assisted suicide charge. R., New Trial Br., Exh. A at 2, Exh. C at 3. Gorosh's former mentor, Schwartz, also warned him on two separate occasions not to move to quash the assisted suicide count. New Trial Br., Exh. B at 3-4. Judge Cooper explicitly told Gorosh that eliminating the assisted suicide count would lead to the exclusion of testimony about the suffering of Thomas Youk's family and about Thomas Youk's medical condition, and was baffled by his strategy to challenge the assisted suicide count in lieu of the murder count. March 3, 1999 Motion Hearing Tr. at 12-13 (the Court).

Notwithstanding his lack of personal competence to handle the case, Gorosh did not associate with any other lawyer who was capable of handling the case in explicit violation of MRPC 1.1(a). Gorosh ignored advice he received from experienced attorneys at his former firm, including advice from Schwartz, an attorney with over twenty-five years experience, and Fieger, an attorney who had successfully defended Dr. Kevorkian in a number of previous assisted suicide cases. R., New Trial Br., Exh. B at 3-4. Regardless of the competence and experience of co-counsel, Gorosh did not listen to her advice, and made all the decisions on his own. R., New Trial Br., Exh. A at 2. Gorosh completely

shut out co-counsel, Dwyer. It became clear to Dwyer that Gorosh was not heeding any of her advice, and she attempted to withdraw. *Id.* Gorosh would not allow this because of the relationship that had developed between Dwyer and Dr. Kevorkian. *Id.* At the same time Gorosh was insisting that Dwyer stay on the case, he refused to keep her informed about the case, and effectively removed her from the decision-making process. Gorosh was running the show, despite his lack of competence to do so alone. *Id.*

Second, Gorosh prepared no defense whatever for his client, Dr. Kevorkian, and did not even challenge the cause of death although there was significant evidence to support raising this question due to Thomas Youk's advanced stage of his ALS. In addition, Goroah withheld advice in his role as advisor when Dr. Kevorkian decided that Gorosh would not be presenting the case to the jury as an advocate. Gorosh withheld advice during the trial in hope of causing Dr. Kevorkian to feel helpless and turn over all aspects of the case to Gorosh. Gorosh's behavior clearly violated his responsibilities under the Rules. It is well-settled that "the client has the ultimate authority to determine the purposes to be served by legal representation." MRPC 1.2, *comment*. It was Gorosh's obligation to abide by the wishes of his client, Dr. Kevorkian, and provide the type of assistance requested. Instead, Gorosh demanded things be done his way, and ignored or subverted the wishes of his client. R., New Trial Br., Exhs. A, C; R. New Trial Reply Br., Exh. A. When Dr. Kevorkian decided to conduct his own defense and requested only advice from Gorosh, Gorosh was insulted and was unable to function in the capacity of an advisor although he still served in this capacity. Not only did Gorosh fail to provide the advice Dr. Kevorkian wanted and needed, he also did not allow co-counsel, Dwyer, to sit next to Dr. Kevorkian at trial so that she could provide advice. R.,

New Trial Br., Exh. A at 4. Gorosh ceased giving his client legal advice, and stood in the way of Dr. Kevorkian receiving legal advice from co-counsel. Refusal of counsel to participate in the course and conduct of his client's trial has been severely criticized by this Court. *People* v. *Travis*, 182 Mich. App. 389, 395; 451 N.W.2d 641 (1990).

In contravention of the Rules, Gorosh put his own interests ahead of those of his client. R., New Trial Br., Exh. A at 4. Gorosh demonstrated repeatedly that what was most important to him was the attention he received from this case. Gorosh was more concerned about his own reputation, and the effect being removed from the case would have on him, than about the best interests of Dr. Kevorkian. *Id.* at 3-4. Gorosh's desire for the media spotlight and his indignation and displeasure at not conducting the trial caused Gorosh to lose sight of his responsibilities. R., New Trial Br., Exh. C at 4. Gorosh neglected his duty to zealously represent his client, and he put his own interests ahead of his client's interests in violation of MRCP 1.3. R., New Trial Br., Exh. C at 4, Exh. B at 5.

Third, Gorosh did not even interject nor instruct Dr. Kevorkian to make appropriate objections during trial, even though co-counsel, Dwyer, admonished him to do so. Gorosh sat idly by as inappropriate comments were made in the presence of the jury, knowing full well that Dr. Kevorkian did not have the legal training and understanding to make these objections on his own. *E.g.*, March 25, 1999 Tr. at 50-54. It was Gorosh's duty as an attorney to protect the rights of his client. Dr. Kevorkian needed help as to the proper objections to raise, and as to trial procedure. This is the very sort of legal help and advice Gorosh, as lead defense counsel, was obligated and expected to give his client in his role as advisor. Although Dwyer attempted to prompt Gorosh to object or instruct Dr. Kevorkian to do so, Gorosh failed and

refused to do so on numerous occasions throughout the trial, including, but not limited to, instances involving: (1) the Prosecutor's comments about Dr. Kevorkian's decision to avail himself of his Fifth Amendment right not to testify; (2) the Prosecutor's leading questions; (3) the Prosecutor's comments regarding Dr. Kevorkian's intent after the Trial Court prohibited Dr. Kevorkian from presenting evidence regarding his intent; (4) the Prosecutor's comments regarding consent after the Trial Court prohibited Dr. Kevorkian from presenting evidence regarding consent; and (5) the Prosecutor's reference to possible penalty to Dr. Kevorkian. March 25, 199 Tr., Vol. III at 26, 28-31, 45-46, 50, 53-54 (Skrzynski); March 23, 1999 Tr., Vol. II at 77-79 (Skrzynski).

Fourth, Gorosh allowed the relationships among co-counsel to deteriorate to such a point that it was impossible for them to provide effective assistance to Dr. Kevorkian. Gorosh threatened to tell Judge Cooper that Dwyer's pre-trial motion to quash the murder count was "ridiculous" as Dwyer has reported. He publicly disparaged the work Dwyer was doing on the interlocutory appeal, calling it merely "a lot of pretty words." The defense team was hardly communicating with each other during the trial, and was not functioning as the counsel guaranteed by the Constitution. R., New Trial Br., Exhs. A, C; R., New Trial Reply Br., Exh. A. Gorosh refused to listen to, much less heed, the advice of co-counsel as Dwyer has made clear. R., New Trial Br., Exh. A. According to Dwyer, Gorosh promised both Dwyer and another young lawyer that they would participate in the trial, pitting them against each other from the start. This led to bitterness and disagreements when it became evident they would not both participate in the trial.

In fact, Gorosh allowed his relationship with his client, Dr. Kevorkian, to deteriorate to such a point that it was

impossible to provide effective assistance. Gorosh's conversations with his client, Dr. Kevorkian, were reduced to shouting matches prior to trial. R., New Trial Br., Exh. A at 3. Gorosh would not allow Dr. Kevorkian to have the counsel of his choice. *Id.* Gorosh indicated Dwyer could not conduct the trial, despite Dr. Kevorkian's wishes. *Id.* In fact, Dwyer has revealed that Gorosh threatened to fire Dwyer and implied that her professional reputation would be damaged if she proceeded to represent Dr. Kevorkian alone. Furthermore, despite Dr. Kevorkian's specific instructions that the other young lawyer was not to be part of the legal team, Gorosh continued to keep the other lawyer present. R., New Trial Br., Exh. A at 3; Exh. C at 3.

Fifth, Gorosh did not maintain adequate communication with Dr. Kevorkian. Rule 1.4 states, "[a] lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." MRPC 1.4(a). A lawyer should maintain communication with a client concerning representation. MRCP 1.0, *comment.* Although Gorosh met with Dr. Kevorkian from time to time to discuss the case, he merely assured Dr. Kevorkian that everything was being handled. R., New Trial Br., Exh. C at 2. Gorosh, did not however, respond to Dr. Kevorkian's requests for information despite Dr. Kevorkian's repeated inquiries, and never even showed Dr. Kevorkian a complete witness list. R., New Trial Reply Br., Exh. A at 1. Furthermore, Gorosh essentially withheld advise and assistance to his client as communications broke down. R., New Trial Br., Exh. A at 3-4, Exh. C at 3-4. He did not provide the aid and assistance Dr. Kevorkian wanted and needed before and during the trial, and rarely returned Dr. Kevorkian's telephone calls. R., New Trial Br., Exh. C at 3; R., New Trial Reply Br., Exh. A.

Finally, Gorosh's behavior in the courtroom was totally inappropriate. A lawyer has a duty, in accord with his role as an advocate, to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRCP 1.3, *comment*; MRCP 1.0, *comment*. Gorosh's courtroom behavior was a violation of this duty to zealously represent the interests of his client. In addition to withholding advice and assistance during trial, Gorosh's behavior at counsel table not only was injurious and prejudicial to his client because of the negative impact it may have had on the jury, but it was also undignified and discourteous. R., New Trial Br., Exh. A at 4, Exh. C at 3-4. It was wholly inappropriate for Gorosh to make gestures, roll his eyes, or sigh while Dr. Kevorkian was presenting his case. Gorosh's behavior could only serve to draw the attention of the jury to Gorosh's doubts about his client's defense. According to the defense's own jury consultant, such behavior indicated that Gorosh lacked confidence in his client. R., New Trial Br., Exh. C at 4. Indeed, the jury could not help but see this behavior because Gorosh insisted on remaining seated next to Dr. Kevorkian at counsel's table, even when Dr. Kevorkian suggested otherwise. Gorosh was cautioned to stop this inappropriate behavior, but did not. R., New Trial Br., Exhs A at 4, C at 3-4; R., New Trial Reply Br., Exh A at 1.

2. *Dr. Kevorkian was prejudiced by Gorosh's unreasonable performance.*

Dr. Kevorkian was materially prejudiced by the poor performance of counsel. There is prejudice to the defendant if there is a reasonable probability that, absent the errors, the finder of fact would have had reasonable doubt respecting guilt. *Pickens*, 446 Mich at 312. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 314.

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Because of Gorosh's dereliction of his duties as advocate and advisor, Dr. Kevorkian did not receive the "counsel" guaranteed him by the Sixth Amendment, and was thus deprived of his right to a fair trial. Based upon the information and facts received from Dwyer, Holmes and Schwartz, Gorosh flouted his professional responsibilities as stated in the Michigan Rules of Professional Conduct. These Rules emphasize the overarching role of an attorney to perform in the best interests of his client and to zealously protect his client's rights. The Rules further confirm an attorney's responsibility within the legal system to ensure the fair administration of justice. Gorosh's blatant disregard for even the most minimal standards of professional conduct resulted in the presentation of a defense that was an embarrassment and an affront to the legal system, and thus deprived Dr. Kevorkian of a fair trial.

First, Dr. Kevorkian was deprived of presenting favorable testimony because Gorosh did not properly prepare legal and factual reasons to present to the Court as to why such testimony should be permitted, as more fully explained in Section I(B)(1). Such testimony would have been beneficial to Dr. Kevorkian because it would have shed light on the facts and circumstances surrounding the events that led to his arrest. Such dramatic testimony may very well have provided the jury with reasonable doubt about Dr. Kevorkian's guilt and resulted in Dr. Kevorkian's acquittal. The grounds for admission of such testimony are straightforward, as set forth in Section V, and any reasonably competent attorney would have been able to articulate these reasons to the Trial Court.

Second, Gorosh never challenged the cause of death at any time during the proceedings even though there was evidence to support raising such an issue due to the advanced

stage of Thomas Youk's ALS. Indeed, the ALS was listed as a significant contributing factor on the amended death certificate, and Thomas Youk may very well have passed prior to any actions of Dr. Kevorkian when Mr. Youk gasped as revealed on the videotape. March 23, 1999 Tr., Vol. II at 75-78, 90-91 (Dr. Dragovic); March 25, 1999 Tr., Vol. III at 63 (Skrzynski).

Third, Dr. Kevorkian was not adequately prepared by Gorosh to conduct his own defense. Gorosh did not prepare any defense, and essentially abdicated his role as advisor when he learned he would not be conducting the trial. Gorosh became "more independent, frustrated, and less able to communicate" with Dr. Kevorkian. R., New Trial Br., Exh. A, Exh. C at 4. He did not adequately coach and prepare Dr. Kevorkian for trial, and did not provide the help Dr. Kevorkian wanted and needed. *Id.*; R., New Trial Reply Br., Exh. A. Because of this, Dr. Kevorkian was not able to adequately and competently present any defense to the jury.

Fourth, Dr. Kevorkian was hampered in his Constitutional right to retain the counsel of his choice by Gorosh. While the Trial Court maintains in its Opinion and Order that Dr. Kevorkian could have terminated his representation by Gorosh at any time, the facts do not bear this out. R., New Tr. Br., Exh. A at 3-4. Despite the fact that Dr. Kevorkian indicated he wanted Dwyer to conduct his trial, Gorosh refused to allow this. R., New Trial Br., Exh. A at 3. Gorosh refused to step aside, despite the obvious and insurmountable problems among the defense team. *Id.* The Trial Court neglected to consider the negative ramifications that would have occurred had Gorosh lashed out as a result of his termination as threatened, which certainly would have received intense attention from the media. Because Dr. Kevorkian was not allowed to choose

his own counsel, he elected to conduct his own defense, without adequate aid from Gorosh who withheld advice and assistance during the trial since he was upset that he was not personally conducting the defense. R., New Trial Reply Br., Exh. A.

Finally, the Prosecution was able to conduct direct examination of witnesses through leading questions and to make prejudicial and inappropriate statements to the jury, including, but not limited to, statements regarding Dr. Kevorkian's decision not to testify, statements regarding the penalty phase of the proceedings and statements regarding issues that had been stricken from the case such as intent and consent. Because Gorosh failed to object, or advise Dr. Kevorkian to do so, regarding the misconduct of the Prosecution, Dr. Kevorkian was deprived of a fair trial.

* * *

B. *Dr. Kevorkian's Actions In Helping Thomas Youk to End His Unbearable Pain and Suffering Are Constitutionally Protected by the Ninth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 17 and 23 of the Michigan Constitution.*

Both the Michigan and United States Constitutions guarantee that a person shall not be deprived of liberty. U.S. Const., Am. XIV; Const. 1963 Art. I, § 17. These guarantees of liberty should be construed to include a Constitutional right of a patient to be free from unbearable pain and suffering.

The Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state . . . shall

deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV. Similarly, Article 1, Section 17 of the Michigan Constitution states, in pertinent part, "No person . . . shall be deprived of life, liberty or property, without due process of law." Const. 1963, art. 1, § 17.

The Ninth Amendment and the almost identical words of Article 1, Section 23 of the Michigan Constitution explicitly state that certain unenumerated rights are reserved to the People, and are not to be abridged by the government. U.S. Const., Am. IX; Const. 1963, Art. 1, § 23.

Traditional Constitutional interpretation requires that every word has its due force and meaning. *Ogden* v. *Saunders*, 25 U.S. (12 Wheat) 213 (1827). Logically then, there must be some unenumerated rights protected by the Ninth Amendment to the United States Constitution and Article 1, Section 23 of the Michigan Constitution. Such unenumerated rights, like the rights specifically set out in the first eight amendments to the United States Constitution, are specifically reserved to the People.

If the Ninth Amendment is to have any substantive meaning, as required under traditional rules of Constitutional construction, a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment and Article 1, Section 23 of the Michigan Constitution. This Honorable Court should recognize such a right, and give it force through the guarantees of the Ninth Amendment to the United States Constitution and Article 1, Section 23 of the Michigan Constitution.

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The United States Supreme Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to certain medical procedures. The United States Supreme Court has recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. *Roe* v. *Wade*, 410 U.S. 113 (1973). In *Roe*, the right to privacy inherent in the "liberty" protected by the Fourteenth Amendment was held to guarantee a woman's right to the medical procedure of abortion prior to viability.

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a medical condition. The United States Supreme Court and almost every state have implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death. *Vacco* v. *Quill*, 521 U.S. 793 (1997). The necessary and direct corollary of this position is that a person should not be forced to suffer unbearably. In some cases, this right can simply be assured by a doctor providing sufficient pain medication, even at the risk of hastening death. But in other situations, such as the case at bar, the only medical way to end the interminable suffering of patients such as Thomas Youk is to provide them with an injection to permanently end their suffering. Thus, the right to be free of unbearable pain and suffering caused by a medical condition is inherently part of the "liberty" secured by the Fourteenth Amendment, as well as one of the unenumerated rights reserved to the People by the Ninth Amendment.

There is no more personal and fundamental right than the right to be free from intolerable and unending pain and suffering due to an incurable medical condition. This right

is so basic and fundamental, it is a perfect example of one of the unenumerated but still protected rights reserved exclusively to the People, and not subject to abridgment by the government.

In *Washington* v. *Glucksburg*, 521 U.S. 702 (1997), the United States Supreme Court held that there is no Constitutional right to physician-assisted suicide, but premised its holding on the fact that a *patient could receive adequate pain medication to alleviate his suffering, even if doing so would hasten the patient's death*. Justice O'Connor stated that it was not necessary for the Court in *Glucksberg* to reach the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 737 (O'Connor, J., concurring). The Court did not reach this question in *Glucksberg* and *Vacco* because it was undeniable that the dying patients in those cases had access to adequate medication to relieve their pain.

Justice Breyer, in *Glucksberg*, acknowledged that the right to be free from unbearable pain would be central to any constitutional claim of a right to hasten inevitable death, and that if such a situation were presented, the Court might have to revisit its conclusions. *Glucksberg*, 512 U.S. at 792 (Breyer, J., concurring). Justice Breyer further acknowledged that medical care allows for the alleviation of pain in all but a few individuals. *Id.* at 791-792. For these individuals the only solution to the unbearable pain is sedation, which can result in a coma. *Id.* Such a result would lead to the situation in *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), where the Supreme Court recognized the right of a comatose person on life support to remove such medical equipment, even though it would hasten death. It is infinitely

more sensible to recognize the right of those with unbearable pain *that can not be alleviated by medical means short of sedation leading to coma* to take any and all affirmative steps necessary to alleviate this pain.

Justice Stevens, in *Glucksberg*, likewise indicated that where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated and he would not "foreclose the possibility that an individual plaintiff seeking to hasten her own death, *or a doctor whose assistance was sought*, could prevail in a more particularized challenge." *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring, emphasis added). Justice Stevens noted that state concerns against abuse will not always outweigh the individual liberty interests of a particular patient. *Id.* at 749-750. Justice Stevens further stated that, "avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty . . . to define one's own concept of existence." *Id.* at 745 (internal citation omitted). Justice Stevens indicated that "some intrusions on the right to decide how death will be encountered are also intolerable." *Id.* Justice Stevens finally acknowledges that "a doctor who prescribes lethal medication does not necessarily intend the patient's death–rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes." *Id.* at 751.

Justice Souter, in *Glucksberg*, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring).

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Thus, Justices on the Supreme Court have suggested allowing for interpretation of the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures. *See*, *Roe* v. *Wade*, *supra*. The holdings in *Glucksberg* and *Vacco* that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was clearly predicated on the fact that the terminally ill person was being provided adequate pain medication and was not undergoing unbearable suffering. Under *Glucksberg*, a terminally ill person does have a right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

For Thomas Youk, a person in the end stages of a fatal and unforgiving disease, pain medication could no longer relieve his suffering. This is clear from the videotapes introduced into evidence, and would be further expounded upon by the testimony of Melody and Terry Youk, which was not permitted to be presented at trial.

The only medical relief for Thomas Youk's condition was the relief he sought from Dr. Kevorkian. The injection Dr. Kevorkian gave to Thomas Youk was the only effective medical way to alleviate Thomas Youk's unbearable suffering. No pain medication would suffice, and there was no other beneficial medical alternative that would have aided Thomas Youk.

Thus, Dr. Kevorkian requests this Court to follow the logical implications of *Glucksburg* and *Vacco*, and recognize a Constitutional right to be free from unbearable pain and suffering.

APPENDIX 16 — ORDER OF THE MICHIGAN SUPREME COURT, LANSING, MICHIGAN DATED APRIL 9, 2002

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

120561 & (78)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK KEVORKIAN,

Defendant-Appellant.

SC: 120561
COA: 221758
Oakland CC: 98-163675-FC

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The application for leave to appeal from the November 20, 2001

decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Kelly, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 9, 2002 s/ Corbin R. Davis

APPENDIX 17 — PETITIONER, DR. JACK KEVORKIAN'S, MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JULY 17, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-CV-
Hon.

DR. JACK KEVORKIAN,

Petitioner,

vs.

WARDEN HENRY GRAYSON,

Respondent.

PETITIONER, DR. JACK KEVORKIAN'S, MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant application pursuant to 28 U.S.C. § 2241(d) and § 2254(a) inasmuch as Dr. Kevorkian was convicted and sentenced by the Oakland County Circuit Court for the State of Michigan which is located in the Eastern District of Michigan.

Appendix 17

STATEMENT OF ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO OVERTURN DR. KEVORKIAN'S CONVICTION WHERE THE PROSECUTOR IMPERMISSIBLY COMMENTED UPON DR. KEVORKIAN'S FIFTH AMENDMENT RIGHT NOT TO TESTIFY WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT?

II. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO APPLY THE STANDARD OF REVIEW MANDATED BY THE UNITED STATES SUPREME COURT TO DR. KEVORKIAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT?

III. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO DISMISS THE CHARGES AGAINST DR. KEVORKIAN IS CONTRARY TO FEDERAL LAW INASMUCH AS SUCH CHARGES VIOLATE THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In or around the fall of 1998, upon learning that he would be charged with a crime by the State of Michigan for committing an act protected by the Ninth and Fourteenth Amendments to the United States Constitution, Dr. Kevorkian retained attorney David Gorosh ("Gorosh") to serve as his lead defense trial counsel in connection with his impending prosecution by the State of Michigan for first degree murder, delivery of a controlled substance and assisting a suicide with respect to the death of Thomas Youk ("Youk"). Exh. A (Affidavit of Lisa Dwyer, Esq.) at 1.

Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan for approximately five years at the time, was asked by Gorosh to serve as co-counsel. *Id.* at 1. At the time, Gorosh had only three years of legal experience, and his trial experience was extremely limited. Exh. B (Affidavit of Michael Schwartz, Esq.) at 1-2, 4-5. Gorosh had never defended a felony, much less a murder case. *Id.* at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that, when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. *Id.* at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. Exhs. A at 2, B at 2-5.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I -

first degree murder, Count II - delivery of a controlled substance and Count III - assisting suicide. Exhs. C at 119-124, 142, D.

These charges were brought against Dr. Kevorkian based upon a videotape that was aired on the television program "60 Minutes," which subsequently was admitted as an exhibit at the trial. Exh. E at 8-9. The videotape revealed that: (1) Youk suffered from ALS, a degenerative disease that caused him unbearable pain and suffering; (2) Youk had no control of his muscles and was terrified of choking; (3) Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his unbearable pain and suffering; and (4) in order to relieve Youk's unbearable pain and suffering, Dr. Kevorkian administered an injection to Youk, even though such injection could hasten the time of death. *Id.* The Prosecution alleged that this act constituted murder in violation of MCL 750.316, possession of a controlled substance in violation of MCL 333.7401(2)(b) and criminal assistance to suicide in violation of MCL 750.329a. Exh. D.

During the initial stages of the co-representation, Dwyer felt she would have input regarding defense strategies. Exh. A at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized her recommendations would have no effect on Gorosh's decisions. *Id.*

The relationship between Dwyer and Gorosh deteriorated rapidly, and, by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. *Id.* at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian, a relationship Gorosh himself lacked. *Id.* at 1. Nevertheless, Gorosh's control over all aspects of the case remained

unyielding. *Id.* at 1-2. Gorosh withheld vital information from Dwyer. *Id.* Gorosh made public comments without consulting Dwyer, and made comments to the media against the express wishes of his client, Dr. Kevorkian. *Id.*; Exh. F (Affidavit of Dr. Kevorkian) at 1. Besides ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. *Id.*

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. Exh. A at 1-2. Gorosh proceeded with this motion against the advice of co-counsel, Dwyer, as well as several experienced attorneys, and against the express wishes of his client, Dr. Kevorkian. Exhs. A at 1-2, B at 3-4, F at 1. Schwartz and Geoffrey Fieger, Esq. ("Fieger")[1], experienced criminal attorneys and Gorosh's former employers, strongly advised Gorosh *not* to seek dismissal of the assisted suicide charge. Exh. B at 1-4.

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide count. Exhs. A at 2, B at 3-4. At the motion hearing held on March 3, 1999, even Judge Jessica Cooper was baffled by Gorosh's decision. Exh. G at 12 (Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. *Id.* at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this court to dismiss the four-year felony [*i.e.*, the assisted suicide charge] and let him go to trial on murder in the first degree?" *Id.* at 12 (Court). The Court then questioned Gorosh about the prudence of this purported strategy, asking "What if they decide not to

1. Fieger and Schwartz had previously successfully defended Dr. Kevorkian against similar charges on a number of occasions.

participate on assisted suicide at all and they just go for murder." *Id.* at 13. Gorosh replies, "What do you mean?" *Id.* (Gorosh). The Court continues, "What if they decide . . . that they're going to nolle pros the assisted suicide?" *Id.* (Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" *Id.* Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. *Id.* at 13-14 (Gorosh).

On March 12, 1999, the Prosecution did *nolle prosequi* the assisted suicide charge, as the Court had warned during the March 3, 1999 hearing. Exh. H at 3 (Skrzynski).

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense, *i.e.*, Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding other matters. Exh. A at 2. Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. *Id.* At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she would not permit a hybrid defense. *Id.*; Exh. I at 12-14 (Court). According to Judge Cooper, Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. *Id.* At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. Exhs. A at 2, J (Affidavit of Ruth Holmes, CDE) at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including the examination of all witnesses, except the medical examiner. Exh. A at 2.

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On the weekend immediately preceding Dr. Kevorkian's trial, Gorosh did little to prepare. *Id.* at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial. *Id.* Gorosh spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. *Id.* Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. *Id.*; Exh. F at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. Exh. A at 3. At about 10:30 a.m., Gorosh and the other young attorney arrived. *Id.* at 3. Dr. Kevorkian immediately became distressed that this young attorney was present, because he had explicitly instructed Gorosh not to bring him. *Id.*; Exhs. C at 2, F at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. Exhs. A at 3, C at 2-3, F at 1.

Dr. Kevorkian told Gorosh that he would represent himself unless Dwyer could represent him at trial. Exhs. A at 3, C at 2-3. Gorosh was adamant that Dwyer could not do so. Exh. A at 3. Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. *Id.* For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. *Id.*

Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. *Id.* Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. *Id.* In addition, Dwyer indicated that she

felt awkward because Gorosh had asked her to assist as co-counsel. *Id.* Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh, whom he did not trust. *Id.*

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. *Id.* Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. *Id.*

Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. Exhs. E at 95-96, 101, 135, 137, 145 (Court), K at 10-12, L at 13, 25-26 (Court). In addition to his actions as advocate before trial, Gorosh continued to act as an advocate at times, as well as an advisor, for Dr. Kevorkian during trial. Exhs. A at 2, E at 95-96, 98 (Court).

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. Exhs. A at 4, K at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial. Exh. K at 268. Dr. Kevorkian understood his role to be that of a mouthpiece to present information prepared by his attorneys. Exhs. E at 137, L at 12-13, 25-26.

After it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice, in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh out of frustration and desperation. Exh. J at 3-4. As the trial

progressed, Gorosh became far more interested in making comments to the media than in defending his client. Exhs. A at 1-4, F at 1, J at 4. Gorosh's priorities became distorted, detrimentally affecting Dr. Kevorkian's defense and best interests. Exhs. F at 1, J at 4.

Furthermore, during the trial, Gorosh openly displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. Exhs. A at 4, J at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked and appeared to share the Trial Court's discomfort during difficult points, rather than assisting and supporting his client, Dr. Kevorkian. Exh. A at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. *Id.*; Exh. F at 1. Ruth Holmes, CDE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. Exh. J at 1. Holmes advised Gorosh that his behavior during trial would have a negative effect on the presentation of Dr. Kevorkian's defense. *Id.* at 4.

During the times that Gorosh acted as an advocate, as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial proceedings themselves, although Dr. Kevorkian sought and needed such advice. *Id.*; Exh. F at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. Exh. F at 1. Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. *Id.* As the trial progressed, Dr. Kevorkian developed further

distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel. *Id.* Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. *Id.*

Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments, which references blatantly violated Dr. Kevorkian's Fifth Amendment right not to testify. Exh. A at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion, involving an improper comment unrelated to Dr. Kevorkian's right not to testify. *Id.*; Exh. M at 65 (Dr. Kevorkian).

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and delivery of a controlled substance. The Michigan Department of Corrections ("MDC") recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court (the "Sentencing Report"). Exh. N (filed under seal). The Sentencing Report indicates that the facts and circumstances of this case are unusual inasmuch as Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. *Id.* at 2. The Sentencing Report further states that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines. *Id.*

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the MDC, the Trial Court did not deviate from the standard sentencing guidelines, and instead sentenced Dr. Kevorkian to ten to twenty-five years in prison on the second degree murder

conviction, and three to seven years in prison for the delivery of a controlled substance. Exh. O at 38 (Court).

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. The Motion for a New Trial was based on affidavits from, and conversations with, members of the defense team who explained the facts and circumstances of Gorosh's representation of Dr. Kevorkian. Exhs. A, B, F, L. The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for an evidentiary hearing[2], without allowing argument, in an Opinion and Order dated July 15, 1999.

Dr. Kevorkian timely filed his Claim of Appeal in the Michigan Court of Appeals on August 23, 1999 raising several Constitutional issues. Dr. Kevorkian filed his Appellate Brief on November 11, 1999.

On November 20, 2001, the Court of Appeals rejected Dr. Kevorkian's request for reversal and/or a new trial based upon the Constitutional arguments he asserted. Exh. P.

Dr. Kevorkian made timely application for leave to appeal the erroneous November 20, 2001 Order of the Michigan Court of Appeals to the Michigan Supreme Court (the "Application"). On April 9, 2002, the Michigan Supreme Court denied Dr. Kevorkian's Application. Exh. Q.

On July 3, 2002, Dr. Kevorkian filed a Petition for Writ of Certiorari with the United States Supreme Court, which is currently pending.

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2. Michigan law requires an evidentiary hearing, known as a "*Ginther* hearing," where the effectiveness of counsel is called into question. *See*, *People* v. *Ginther*, 390 Mich. 436, 442-443; 212 N.W.2d 922 (1973).

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ARGUMENT

I. STANDARD OF REVIEW.

28 U.S.C. § 2254(a) states, "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The application shall not be granted unless the applicant has exhausted all remedies available in the State Courts. 28 U.S.C. § 2254(b)(1)(A). The application may be granted if the claim that was adjudicated in the State Court:

(1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law* as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on *an unreasonable determination of the facts in light of the evidence presented* in the State Court proceeding. 28 U.S.C. § 2254(d) (emphasis added).

II. THE INSTANT PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO GRANT DR. KEVORKIAN A NEW TRIAL IN LIGHT OF THE PROSECUTOR'S IMPERMISSIBLE COMMENTS ABOUT DR. KEVORKIAN'S DECISION NOT TO TESTIFY WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

The Fifth Amendment to the Constitution states, "No person . . . shall be compelled to be a witness against himself." U.S. Const. Am. V. This provision was made applicable to the states via the Fourteenth Amendment by the Supreme Court's decision in *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964).

In *Griffin* v. *California*, 380 U.S. 609, 614 n.5 (1965), the Supreme Court held that the prosecution may *not* comment on the accused's silence, expanding on the general rule set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. *Griffin*, 380 U.S. at 614. Permitting such comment by the prosecution amounts to an impermissible penalty imposed by courts on the exercise of a Constitutional privilege. *Id.* Whether a jury may draw a negative inference *on its own* from the accused's failure to testify is vastly different than the court solemnizing such silence into evidence against the accused, and such court action is prohibited by the Constitution. *Id.*

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The Supreme Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer *no penalty* . . . for such silence." *Malloy*, 378 U.S. at 8 (emphasis added). *Accord*, *Spevack* v. *Klein*, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of *any sanction* which makes assertion of the Fifth Amendment privilege costly." *Spevack*, 385 U.S. at 515 (citation omitted, emphasis added). The Supreme Court has cautioned that even the *slightest* encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed *liberally*. *Id.* at 515-516. *See also*, *Coppola* v. *Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989) (the privilege against self-incrimination should be given liberal application); *Spevack*, 385 U.S. at 515 (Constitutional provisions for the security of person and property should be liberally construed). Thus, courts must guard against even the subtlest implications by the prosecution alluding to the accused's decision to exercise his absolute Fifth Amendment right. *Id.*

In accord with the Supreme Court's holding in *Griffin*, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or are they of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions were given and when. *Lent* v. *Wells*, 861 F.2d 972, 975 (6th Cir. 1988). The statements must be viewed in context, "not singled out and standing alone," and in the aggregate. *Id.* at 976. *Accord*, *Berryman* v. *Colbert*, 387 F.Supp. 378, 380 (E.D. Mich. 1974).

If the reviewing court determines that there was error, it must then determine if the error was harmless. *Lent*, 861 F.2d at 975. "Harmless error, in the context of the violation of a Constitutional Right of a defendant is an *extremely narrow* standard permitting the state to avoid retrial of a defendant only when it can *demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.*" *Id.* at 977, *citing*, *Chapman* v. *California*, 386 U.S. 18 (1967) (emphasis added). The Supreme Court has held that the reviewing court must make a determination whether, absent the prosecutor's allusion to the accused's failure to testify, it is clear *beyond a reasonable doubt* that the jury would have returned a verdict of guilty. *United States* v. *Hastings*, 461 U.S. 499, 510-511 (1982). Indeed, in *Lent*, although the Sixth Circuit agreed the case was certainly strong enough to find the defendant guilty, it held that the state had still not demonstrated *beyond a reasonable doubt* that the Constitutional error was harmless, as required by the Supreme Court's holding in *Hastings*, *supra*. *Lent*, 861 F.2d at 977.

Although the Michigan Court of Appeals acknowledged the clear precedent affirming that *no comment* may be made with respect to a defendant's decision to assert his Constitutional right not to testify, it erroneously asserted, *without support*, that such precedent is inapplicable where a defendant proceeds *in propria persona*[3].

No decision of this Court, or any Circuit Court of Appeals, has held that the Fifth Amendment right against

3. For the reasons fully set forth below, Dr. Kevorkian did not decide to proceed *in propria persona*. Nevertheless, even assuming *arguendo* that he had, this has no effect on the obligation of the Court to fully enforce his right against self-incrimination as guaranteed by the Fifth Amendment.

self-incrimination is *in any way diminished* when a defendant chooses to exercise his Constitutional right to represent himself, and thus the Michigan Courts' refusal to apply the clear precedent of the United States Supreme Court to this case is unreasonable.

The Michigan Court of Appeals relied upon an ill-conceived decision of the Michigan Supreme Court, *People* v. *Marcus Jones*, 442 Mich. 893; 499 N.W.2d 344 (1993), to support its erroneous assertion that a Prosecutor, in making objections, may comment upon the accused's right not to testify. In *Marcus Jones*, the Michigan Supreme Court refused to grant defendant a new trial where defendant was warned by the trial court to cease interrupting the prosecution's closing. The trial court warned defendant that he "had an opportunity to testify." *Id.* at 894. The Michigan Supreme Court determined that the trial court's response was a proper, though awkward, response to defendant's interruptions. *Id.*

In the case at bar, it was the Prosecutor who repeatedly interrupted Dr. Kevorkian. The Prosecutor, who is (or should be) well-versed with respect to a defendant's Fifth Amendment right, could have simply objected without explanation, or sought a bench conference out of the presence of the jury. Instead, on more than five occasions, the Prosecutor used his objections as an excuse to interject, in front of the jury, that Dr. Kevorkian had chosen to exercise his Constitutional right not to testify.

In any event, even if *Marcus Jones* stands for the proposition asserted by the Michigan Court of Appeals, this holding would violate the United States Constitution and contradict previous holdings of the United States Supreme Court. Thus, any interpretation of the *Marcus Jones* decision

that would permit an encroachment upon an accused's Fifth Amendment right not to testify, as suggested by the Michigan Court of Appeals, is invalid inasmuch as it would violate the Federal Constitution, and would be an unreasonable application of the precedent of the United States Supreme Court.

In fact, the Prosecution violated Dr. Kevorkian's Constitutional rights when the Prosecutor made comments during the trial which were clearly of such a character that the jury would naturally and reasonably take them as a reference to his Constitutionally protected decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court, which probing analysis the Michigan Courts failed and refused to undertake. *See*, *Lent*, 861 F.2d at 977.

By closely examining the comments made by the Prosecutor, it is clear that the jury would understand that the Prosecutor was in fact repeatedly referring to Dr. Kevorkian's failure to testify. During Dr. Kevorkian's closing argument, the Prosecutor made at least four comments, in a very short period of time, referring to Dr. Kevorkian's failure to testify. The Prosecutor said, "*He can't testify now. He can't tell the facts now.*" Exh. M at 50 (emphasis added). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury *which have not been proven before through testimony or other evidence. He cannot testify now.*" *Id.* at 53 (emphasis added). The Prosecutor continued to state "[the defendant] *could have gotten on -- you know, he didn't.*" *Id.* at 54 (emphasis added). Although the Prosecutor did not use the word "stand" everyone in the courtroom, especially the jury, was able to fill in the blank with the word "stand"

since that is the natural and expected finish of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't."

Finally, the Prosecutor went on to object saying, "*He's now testifying*. He's putting new facts before the jury. He can't do that." *Id.* (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "[Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" *Id.* at 32. This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's Constitutionally protected decision not to testify.

When viewed in context, the Prosecutor's remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified, although this is his Constitutional right. Because of the short period of time in which all the comments were made (between pages 32-33 and then between pages 50-54, attached hereto as Exhibit M), the message was crystal clear. Furthermore, these comments were made during closing argument, and were some of the last things jurors heard before retiring to deliberate. Simply put, it is reversible error to specifically refer to the failure of defendant to take the stand, and the precedent of the United States Supreme Court unequivocally recognizes this. *Griffin*, 380 U.S. at 614 n.5. The Michigan Courts' refusal to reverse Dr. Kevorkian's conviction on this ground is contrary to clearly established Federal law, and therefore the instant Petition should be granted.

III. THE INSTANT-PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO APPLY THE PROPER STANDARD OF REVIEW TO DR. KEVORKIAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

A. *The Michigan Courts' Determination that Dr. Kevorkian Waived His Sixth Amendment Right to Counsel is Unreasonable in Light of Federal Precedent.*

The Michigan Courts failed to apply the proper standard of review to Dr. Kevorkian's claim for ineffective assistance of counsel because the Michigan Courts erroneously determined that Dr. Kevorkian somehow waived his Sixth Amendment right to counsel. However, although the Michigan Court of Appeals' Opinion emphasized the fact that the Trial Court asked Dr. Kevorkian if he was certain he wanted to proceed *pro se*, and claims that Dr. Kevorkian knowingly and voluntarily waived his right to counsel, this simply can not be the case. At the very times that the Trial Court was asking Dr. Kevorkian if he was certain he wanted to waive his right to counsel, it was *allowing* and *encouraging* Dr. Kevorkian to consult with, and have the aid of, counsel in the courtroom at counsel table and on written briefs. Exhs. K at 8-15, L at 25-26, M at 3. In fact, the record makes clear that it was Dr. Kevorkian's wish to use a system of hybrid representation, a plan the Trial Court refused to properly consider, *although it permitted this approach in practice*[4].

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4. The Trial Court misconstrued the applicable law, and determined that a court can not even consider a request for hybrid

(Cont'd)

Exh. I at 12-14. The facts show that Dr. Kevorkian did *not* in fact, and never intended to, represent himself without relying upon assistance from counsel, and the Trial Court *permitted and encouraged this arrangement.*

Indeed, in *Fowler* v. *Collins*, 253 F.3d 244, 246-247 (6th Cir. 2001), the Sixth Circuit reviewed the defendant's application for habeas corpus relief on the basis that he had not given a knowing and intelligent waiver of his right to counsel. The Sixth Circuit granted the application finding that the Michigan Court's determination that defendant's waiver was knowing and intelligent was an *unreasonable* application of established precedent regarding knowing and intelligent waiver. *Id.* at 250. The Sixth Circuit noted that, in order "[t]o ensure that a defendant's waiver is made with eyes wide open, a judge must *thoroughly investigate* the circumstances under which the waiver is made." *Id.* at 249 (emphasis added). The Sixth Circuit further noted that "[t]he fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does *not* automatically end the judge's responsibility." *Id.* at 250 (emphasis added). The Sixth Circuit further stated that the failure of the Michigan trial court to have defendant sign a *written waiver*, as well as the trial court's apparent ignorance of defendant's *expressed concerns* regarding his lack of preparation for trial and defendant's statement that

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(Cont'd)

representation. But, under Michigan law, as well as Federal law, hybrid representation can be and has been allowed in appropriate situations. *See, e.g., People* v. *Ramsey*, 89 Mich. App. 22; 198 N.W.2d 811 (1972); *People* v. *Griffen*, 36 Mich. App. 368, 372; 194 N.W.2d 104 (1971); *United States* v. *Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975); *United States* v. *Tutino*, 883 F.3d 60, 67 (2d Cir. 1989), *cert. den.*, 493 U.S. 1081 (1990).

the indictment against him was complex, were factors which weighed against finding a knowing and intelligent waiver. *Id.*

In a recent unpublished opinion, the Michigan Court of Appeals itself addressed the issue of waiver of counsel in a case similar to the case at bar, and determined that a waiver of the right to counsel can *not* be unequivocal where standby counsel is present, relying in part upon the precedent of the United States Supreme Court. *People* v. *Favors*, Mich. Ct. of Appeals No. 215826 (August 28, 2001) (per curiam) (attached hereto as Exh. R). Thus, according to the Michigan Court of Appeals' own reasoning in *Favors*, *supra*, Dr. Kevorkian's purported waiver *could not* have been effective as to all aspects of representation, because, even as he supposedly waived his right to counsel, *he continued to have counsel to assist him, with the Trial Court's approval. Id.* Indeed, Dr. Kevorkian was under the impression that he was in fact represented by counsel throughout the trial, and that his role was to be that of a mouthpiece to present information prepared by his counsel. Exhs. E at 137, K at 268, L at 12-13, 25-26.

Furthermore, pursuant to *Favors*, the Michigan Court of Appeals' assertion that Dr. Kevorkian expressed satisfaction with his counsel holds *no weight* with respect to the Court's evaluation of whether Gorosh *in fact* provided effective assistance, and thus should have no bearing on this Court's assessment. In any event, although the Michigan Court of Appeals claims that Dr. Kevorkian "never brought any dissatisfaction with Gorosh to the trial court's attention," it nonetheless acknowledged that "[i]n response to the trial court's questioning, [Dr. Kevorkian] first stated that he

was *dissatisfied* with [his attorneys]," before he reversed his position upon prompting from the Trial Court. Exh. P at 20, 26.

B. *The Michigan Courts' Refusal to Review Gorosh's Conduct Under the Strickland Standard is Contrary to the Precedent of the United States Supreme Court.*

Whatever role Gorosh played (and he undisputedly played some role), he did not provide the effective assistance of counsel to which Dr. Kevorkian is guaranteed by the United States Constitution. The Sixth Amendment guarantees an accused "the right . . . to have the assistance of counsel for his defense." U.S. Const., Am. VI.

The United States Supreme Court has made clear that the right to counsel includes the right to *effective assistance of counsel*. *McMann* v. *Richardson*, 397 U.S. 759, 771, n.14 (1970). At issue here is not the denial of counsel, but the actual *performance* of counsel. *See*, *People* v. *Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

As the Michigan Court of Appeals acknowledged, there is but a single standard for claims of ineffective assistance of counsel. The benchmark case in Michigan, *People* v. *Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994), adopted the federal test for reviewing claims of ineffective assistance of counsel set forth by the Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Nonetheless, for the reasons set forth above, the Michigan Courts refused to apply the *Strickland* standard in this case.

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In order to ascertain whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial[5]. *Id.* at 309. The test requires the greatest level of factual inquiry into the *conduct* of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich. at 155.

The Michigan Court of Appeals' refusal to apply the *Strickland* standard to Gorosh's performance during trial (or any standard of conduct *at all*), while providing no basis as to why this standard should not apply, is clearly an unreasonable application of the precedent of the United States Supreme Court.

Had the Michigan Courts reviewed Gorosh's performance at all, it would have been clear that Gorosh's assistance was inadequate under any conceivable meaningful standard of conduct, especially the standard of conduct required by the Supreme Court in *Strickland*, due to numerous

5. The Supreme Court has held that, in some cases, *Strickland*'s prejudice prong may be presumed based on the particular circumstances of the case. For example, "If the accused is denied counsel at a critical stage of his trial [or] . . . if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). In such a case, it is not necessary to demonstrate actual prejudice. *Rickman* v. *Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, *although counsel is present*, "'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.'" *Cronic*, 466 U.S. at 654 n.11, *quoting*, *United States* v. *Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

errors, miscalculations and breaches of professional responsibility. The detailed information received from Dwyer, Holmes, Schwartz and Dr. Kevorkian himself, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and serve to explain why the defense presented on behalf of Dr. Kevorkian was so appallingly inadequate.

The Michigan Court of Appeals acknowledged that Gorosh acted as an advocate for Dr. Kevorkian in presenting various pre-trial motions. *See, e.g.*, Exhs. K at 8, P at 24. It is further undisputed that Gorosh also acted as an advocate at times during the trial.

Even assuming *arguendo* that Gorosh did not act as Dr. Kevorkian's advocate during the trial, which he did, it is undisputed that Gorosh *at least* acted as a counselor and advisor to Dr. Kevorkian. In fact, the Trial Court *required* Gorosh to sit at counsel table and directly instructed Dr. Kevorkian to seek advice from his attorneys on numerous occasions. Exhs. E at 95, 98, 101, 145, K at 10-11, 237, 247, 268, L at 25-27, N at 3. Dr. Kevorkian even indicated his intent to follow the advice of his advisers throughout the trial. Exh. L at 12-13. In that capacity, Gorosh was obligated to provide, and Dr. Kevorkian was entitled to receive, effective advice and consultation as to how to conduct his own defense in accord with the Constitutional guarantee of effective assistance of counsel. The Supreme Court has held that, "if counsel entirely fails to subject the prosecution's case to *meaningful adversarial testing*, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659 (emphasis added). Inasmuch as Gorosh failed to

provide any meaningful advice to aid Dr. Kevorkian in connection with his defense, the prosecution's case was not subjected to any meaningful adversary testing.

IV. THE INSTANT PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO DISMISS THE CHARGES AGAINST DR. KEVORKIAN IS CONTRARY TO FEDERAL LAW INASMUCH AS SUCH CHARGES VIOLATE THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. *Contrary to the Precedent of the United States Supreme Court, the Michigan Court of Appeals Erroneously Held that the Michigan Legislature Should Interpret and Enforce the United States Constitution Instead of the Courts.*

The Michigan Court of Appeals erroneously ruled that it is *not* up to Courts, but up to the legislature, to determine whether there is a Constitutionally protected right to be free from unbearable pain and suffering, and thereby the Michigan Courts have abdicated their Constitutional duty to ensure that the United States Constitution is upheld. The decision of the Michigan Court of Appeals is clearly contrary to Federal law inasmuch as it fails to protect the Constitutional rights of Dr. Kevorkian by deferring to the legislature's interpretation of the Constitution. However, it is up to the Courts (and only the Courts) to interpret and enforce the Constitution, and to ensure that Constitutional rights are protected. Indeed, the United States Supreme Court, reaffirming its historic holding in *Marbury* v. *Madison*, 5 U.S. 137 (1803), made nearly two centuries ago, recently confirmed that "it is emphatically the province and duty of the judicial department to say what the law is." *United States* v. *Morrison*, 529 U.S. 598, 617 (2000) (citation omitted).

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The Michigan Court of Appeals' assertion that the issue of whether there is a Constitutionally protected right to be free from unbearable pain and suffering should be left for the legislature is not only erroneous, but also merely begs the question. If there is such a Constitutionally protected right, *there is no question for the legislature at all because the government can not abridge a Constitutionally protected right*[6]. Thus, if there is such a right, it is the duty and obligation of the courts, including this Court, to ensure that Constitutionally protected rights are not inappropriately infringed upon by the government.

B. *Because the Right to Be Free From Unbearable and Irremediable Pain and Suffering is Deeply Rooted in American Jurisprudence, it is Constitutionally Protected, and the Michigan Courts' Failure to Protect Such a Right is Contrary to Federal Precedent.*

The right to be free from unbearable and irremediable pain and suffering is deeply rooted in this nation's history and in the United States Constitution itself, and therefore is a Constitutional right which should be protected.

First, the United States Constitution guarantees that a person shall not be deprived of liberty. U.S. Const., Am. XIV.

Second, the Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV.

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6. Of course, the legislature could regulate the assertion of the right within Constitutionally boundaries (*i.e.*, certain legislative restrictions on free speech are permissible, while others are not).

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Third, the Ninth Amendment to the United States Constitution states that certain *unenumerated rights are reserved to the People*, and are not to be abridged by the government. U.S. Const., Am. IX.

Fourth, traditional Constitutional interpretation requires that every word has its due force and meaning. *Ogden* v. *Saunders*, 25 U.S. (12 Wheat) 213 (1827).

Thus, logically, there must be *some* unenumerated rights protected by the Ninth Amendment to the Constitution in order that this Amendment is not mere surplusage. Whatever these unenumerated rights are, they are expressly reserved to the People and can not be abridged by the government. U.S. Const., Am. IX. Therefore, if the Ninth Amendment is to have any substantive meaning, as it must under well-recognized rules of Constitutional construction, Dr. Kevorkian asserts that a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment. *Id.* In order for such unenumerated rights to have any practical effect, they must first be recognized by the Courts. Thus, Dr. Kevorkian requested that the Michigan Courts address this issue.

Similarly, and for the very same reasons, the right to be free from unbearable pain and suffering may also be encompassed in the "liberty" guaranteed by the Fourteenth Amendment. Indeed, the United States Supreme Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to obtain (or decline) certain medical procedures. For instance, the United States Supreme Court recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. *Roe* v. *Wade*, 410 U.S. 113 (1973). In *Roe*, the right to privacy inherent in the "liberty"

protected by the Fourteenth Amendment was held to guarantee a woman's right to obtain the medical procedure of abortion prior to viability[7].

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a terminal medical condition. The United States Supreme Court, and almost every state, has implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death, because *no person can be made to suffer unbearably*. *See, e.g., Vacco* v. *Quill*, 521 U.S. 793 (1997).

The necessary corollary of this position is that a person should not be forced to suffer unbearably, and such pain must be alleviated, *even if such alleviation would hasten death*. *Id.* In some cases, such as *Vacco*, this right was assured simply by means of a doctor providing sufficient pain medication, even though the administration of such pain medication could hasten death. *Id.* However, in other situations, such as the case at bar, the only medical method for ending the interminable suffering of patients such as Youk is to provide them with an injection to permanently end their suffering, though such injection will hasten death.

In *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court held that there is no

7. It is worth noting that many of the same "slippery slope" fears posited by the Michigan Court of Appeals were (and still are) raised in opposition to the Supreme Court's *Roe* decision. Nonetheless, the Supreme Court recognized that certain intensely personal decisions, though possibly subject to abuse, are nonetheless Constitutionally protected because certain personal rights are simply not subject to government intrusion.

Constitutional right to physician-assisted suicide, but premised its holding on the fact that *a patient is not restricted from receiving adequate pain medication to alleviate his/her suffering, even if the receipt of such medication hastens the patient's death*[8].

The Michigan Court of Appeals misread the Supreme Court's opinion in *Glucksberg*, and the separate opinions of the Justices in connection therewith, and thus unreasonably applied Supreme Court precedent. Specifically, Justice O'Connor made clear that it was not necessary for the Court in *Glucksberg* to reach the question of "whether a mentally competent person who is experiencing *great suffering* has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 737 (O'Connor, J., concurring) (emphasis added). Thus, the Supreme Court, in *Glucksberg* and *Vacco*, did *not* reach the question presented here, because, as the Michigan Court of Appeals recognized, it was clear that the dying patients in those cases, unlike Youk, had access to adequate medication sufficient to relieve their pain such that they did *not* suffer unbearably. *Id.* at 737-738 (O'Connor, J., concurring) (the "dying patients [involved in *Glucksberg*] can obtain palliative care, even when doing so would hasten their deaths.").

Similarly, Justice Stevens, in *Glucksberg*, indicated that, where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated, and he refused to "foreclose the possibility that an individual plaintiff seeking to hasten her own death, *or a doctor whose*

8. In any event, in the case at bar, Dr. Kevorkian was *not* convicted of assisting a suicide, but was convicted of murder, even though the State failed to prove the requisite elements thereof beyond a reasonable doubt.

assistance was sought, could prevail in a more particularized challenge." *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring) (emphasis added). Justice Stevens noted that state concerns against abuse will *not* always outweigh the individual liberty interests of a particular patient. *Id.* at 749-750. Justice Stevens further stated that, "*avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty* . . . to define one's own concept of existence." *Id.* at 745 (citation omitted, emphasis added). Justice Stevens unequivocally stated that "some intrusions [by the government] on the right to decide how death will be encountered are also *intolerable*." *Id.* (emphasis added). Justice Stevens finally stated that "a doctor who prescribes lethal medication does not necessarily intend the patient's death – rather that doctor may seek simply to ease the patient's suffering *and to comply with her wishes*." *Id.* at 751 (emphasis added). Justice Stevens thus recognized that, in the case of a mentally competent person, it is a doctor's overriding duty to comply with that person's wishes, and an intent to ease unbearable suffering by the only medical means available is simply *not* the same as an intent to cause death, even though death might result.

Furthermore, Justice Souter, in *Glucksberg*, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring)[9].

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9. The Michigan Court of Appeals misconstrued Justice Souter's opinion as well, focusing on the issue of assisted suicide, which is not at issue here. Justice Souter clearly acknowledged that a patient had a right to "bodily integrity" and that a patient had a right to exercise his autonomy by choosing death over being drugged into a stupor or forced to suffer unbearable pain. *Glucksberg*, 521 U.S. at 778-779 (Souter, J., concurring)

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Thus, the United States Supreme Court has interpreted the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures, and Justices of the United States Supreme Court have indicated that the guarantee of liberty may very well apply to the right to be free from unbearable pain and suffering which can not be relieved by palliative care. *See, e.g., Roe, supra.* The holdings in *Glucksberg* and *Vacco* that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was predicated on the fact that the terminally ill person was being provided adequate pain medication and was *not* being forced to endure unbearable suffering. Under *Glucksberg*, a terminally ill person does have a Constitutional right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

Specifically, the right to be free from unbearable pain is deeply rooted in the text of the Constitution itself. The Eighth Amendment to the United States Constitution strictly prohibits cruel and unusual punishment. U.S. Const., Am. VIII. The United States Supreme Court has long recognized that the policy against cruel and unusual punishment embodied in the Eighth Amendment is firmly established in the Anglo-American tradition of criminal justice. *Trop* v. *Dulles*, 356 U.S. 86, 99-100 (1958).

Furthermore, the Eighth Amendment's prohibition against cruel and unusual punishment applies not only to the punishment of those convicted of a crime, but also to *any governmental action that amounts to inhumane treatment. Id.* at 100-101. Thus, *the underlying values of the Eighth Amendment clearly represent a fundamental policy against forcing any citizen to endure unbearable pain for any reason. Id.*

Tellingly, the Supreme Court has held that the Eighth Amendment does *not* prohibit the punishment of death, but *does* prohibit the imposition of death in any manner which causes unbearable suffering, such as burning at the stake, crucifixion or breaking on the wheel. *In re Kemmler*, 136 U.S. 436, 446 (1890). In *Kemmler*, the United States Supreme Court noted that the punishment of death is not in itself "cruel" within the meaning of the Eighth Amendment inasmuch as the prohibition against cruel and unusual punishment set forth in the Eighth Amendment "implies something more inhuman and barbarous, something more than the mere extinguishment of life." *Id.* Thus, this Court has recognized that there are worse fates than death, and, pursuant to the Eighth Amendment, the government can not in any way force citizens to suffer some of those fates (*e.g.*, suffering unbearable and irremediable pain and suffering) *under any circumstances. Id.*

Therefore, while the Eighth Amendment's prohibition against cruel and unusual punishment applies only against the government's imposition of such punishment, the *fundamental values* embodied in the Eighth Amendment make it clear that the Constitution itself abhors the concept of citizens being subjected to unbearable pain and suffering *for any reason*[10]. Furthermore, the Eighth Amendment recognizes that unending, torturous pain and suffering is *worse than death* inasmuch as torture is prohibited, but the humane imposition of death is not. *Kemmler*, 136 U.S. at

10. Specifically, "deliberate indifference to the serious medical needs of prisoners" has been held by this Court to be in violation of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976). *See also*, *Marinez* v. *Mancusi*, 443 F.3d 921, 923 (2d Cir. 1970) (prisoner deprived of pain killers and forced by prison officials to stand, against doctor's orders, following a serious leg operation did raise colorable claim of violation of Eighth Amendment).

446. The Michigan Court's refusal to recognize and apply these fundamental Constitutional values to this case amounts to an unreasonable application of Federal law, and thus the instant Petition should be granted.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant the instant Petition for Writ of Habeas Corpus.

Respectfully submitted,

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Attorneys for Petitioner

Dated: July 17, 2002

APPENDIX 18 — ORDER REQUIRING RESPONSIVE PLEADING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JULY 23, 2003

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CIVIL NO. 02-CV-72927-DT

HONORABLE NANCY G. EDMUNDS

DR. JACK KEVORKIAN, #284797,

Petitioner,

v.

HENRY GRAYSON,

Respondent.

ORDER REQUIRING RESPONSIVE PLEADING

The petition for a writ of habeas corpus has been examined. It is not subjected to summary dismissal under Rule 4, Rules Governing Section 2254 Cases.

IT IS ORDERED that the Clerk of the Court serve a copy of the petition and a copy of this Order on Respondent and on the Attorney General for the State of Michigan by certified mail as provided in Rule 4.

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IT IS FURTHER ORDERED that Respondent file an answer responding to the allegations of the petition in accordance with Rule 5 by **SEPTEMBER 30, 2002**. As part of the answer, Respondent may raise claims that petitioner: (1) has not exhausted his/her habeas issues; (2) may not obtain federal review because of a procedural default; (3) has filed a successive petition; and/or (4) is barred for any other procedural reason from seeking federal habeas review.

IT IS FURTHER ORDERED that, as part of the answer, Respondent shall file with the Clerk a copy of any prior decision, pleading, brief and/or transcript needed to adjudicate the issues presented. A separate index listing the materials being submitted shall also be filed.

s/ Paul J. Komives
Paul J. Komives
UNITED STATES MAGISTRATE JUDGE

DATED: July 19, 2002

CERTIFICATION

I certify that, on the date indicated below, I arranged for service as provided above, and I mailed a copy of this order to petitioner.

Dated: JUL 23 2002

s/ [illegible]
Deputy Clerk

APPENDIX 19 — APPLICATION FOR CERTIFICATE OF APPEALABILITY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED OCTOBER 20, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-CV-72927-DT
Hon. Nancy G. Edmunds

DR. JACK KEVORKIAN,

Petitioner,

vs.

MILLICENT WARREN,

Respondent.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

NOW COMES Petitioner, Dr. Jack Kevorkian ("Dr. Kevorkian"), and hereby requests a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) and Federal Rule of Appellate Procedure 22(b)(1), and states as follows:

1. Dr. Kevorkian filed his Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") on July 17, 2002.

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2. Therein, Dr. Kevorkian alleged that he was being deprived of his liberty by the State of Michigan in violation of the Constitution of the United States inasmuch as he was incarcerated by the State of Michigan in derogation of the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

3. This Court granted Dr. Kevorkian's Petition for consideration pursuant to a July 23, 2002 Order.

4. In its July 23, 2002 Order, this Court ordered Respondent to Answer the Petition.

5. On September 30, 2002, Respondent filed her Answer in Opposition to the Petition.

6. This Court denied Dr. Kevorkian's Petition in an Opinion and Order (the "Order") dated September 29, 2003. This Court also entered a Judgment denying the Petition on the same date.

7. Dr. Kevorkian now seeks to appeal the September 29, 2003 Order of this Court.

8. Pursuant to 28 U.S.C. § 2253(c)(2) and Federal Rule of Appellate Procedure 22(b)(1), Dr. Kevorkian hereby requests a certificate of appealability from this Court.

9. Inasmuch as reasonable jurists have grounds to find this Court's assessment of the constitutional claims *debatable* or wrong, this Court should issue a certificate of appealability. *Slack* v *McDaniel*, 529 U.S. 473, 484; 120 S.Ct. 1595; 146 L.Ed.2d 542 (2000).

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10. Specifically, and without limitation, reasonable jurists could disagree with this Court's determination of the following issues:

A. Although this Court determined that Dr. Kevorkian's claim of a violation of the Ninth Amendment was procedurally defaulted on the basis that such issue was not properly placed before the Michigan Court of Appeals, reasonable jurists could disagree and determine that the issue was properly put before the Michigan Court of Appeals, but the Michigan Court of Appeals nonetheless deliberately and wrongfully ignored the issue;

B. Although this Court determined that no violation of the Fourteenth Amendment exists inasmuch as there is no right to commit euthanasia, Dr. Kevorkian never asserted such a right. Instead, Dr. Kevorkian asserted a right of the patient to be free from unbearable pain and suffering, which right can be asserted by a treating physician. Indeed, this Court acknowledged that the precedent of the United States Supreme Court approves of "aggressive palliative care." Therefore, reasonable jurists could disagree with this Court's framing of the issue and this Court's determination thereof;

C. This Court determined that there was no violation of the Sixth Amendment because Dr. Kevorkian purportedly did receive effective assistance of counsel before trial. This Court nonetheless concedes that: (1) defense "counsel's strategy failed to benefit Petitioner;" (2) defense counsel was "inexperienced;" and (3) defense counsel failed to prepare a defense;

D. This Court determined that there was no violation of the Sixth Amendment because Dr. Kevorkian purportedly "knowingly and intelligently" waived his right to counsel during trial and had no right to a hybrid defense. This Court nonetheless acknowledged that standby counsel were in fact present for "consultation and advice" during trial. Although this Court further acknowledged that the United States Supreme Court has "not yet directly answered" the question of whether a defendant is "entitled to effective assistance of standby counsel," this Court determined that there is no such right based solely upon decisions from other Circuits, including unpublished decisions. Therefore, reasonable jurists could disagree with this Court's conclusion; and

E. This Court determined that Dr. Kevorkian's claim of violation of the Fifth Amendment by the Prosecutor was barred because there was no contemporaneous objection thereto. However, Dr. Kevorkian has asserted that there was no contemporaneous objection because he did not receive effective assistance of counsel, as set forth above, and this Court concedes that Dr. Kevorkian did move for mistrial based upon the Prosecutor's remarks the day after the remarks were made. This Court further concluded that the Prosecutor's remarks did not violate Dr. Kevorkian's Fifth Amendment right. Nonetheless, this Court acknowledged that the Trial Court did not give a curative instruction at the time of the remarks and that the Prosecutors remarks were all made in the

isolated period of Dr. Kevorkian's closing argument. Therefore, reasonable jurists could disagree with this Court's conclusion.

WHEREFORE, for all the foregoing reasons, pursuant to 28 U.S.C. § 2253(c)(2) and Federal Rule of Appellate Procedure 22(b)(1), Dr. Kevorkian respectfully requests that this Court issue a certificate of appealability, and direct the clerk of this Court to forward such certificate to the Sixth Circuit Court of Appeals together with Dr. Kevorkian's Notice of Appeal and the file of the proceedings in this Court.

Respectfully submitted,

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Dated: October 20, 2003

APPENDIX 20 — ORDER DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED NOVEMBER 3, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 02-CV-72927-DT
HONORABLE NANCY G. EDMUNDS

JACK KEVORKIAN,

Petitioner,

v.

MILLICENT WARREN,

Respondent.

ORDER DENYING APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner has filed an application for a certificate of appealability concerning the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.2d 1306, 1307 (6th Cir. 1997).

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A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, __U.S. __, 123 S, Ct. 1029, 1034 (2003). In applying this standard, the court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.*

When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484-85. When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal is warranted. *Id.*

As discussed in this Court's opinion and order, Petitioner's Ninth Amendment claim is barred by procedural default, and he has failed to establish cause and prejudice or that a fundamental miscarriage of justice has occurred with respect to that claim. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

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Further, Petitioner's Ninth and Fourteenth Amendment claims lack merit as the United States Supreme Court has never recognized a right to commit euthanasia under any legal theory, nor has it recognized euthanasia as a legal defense to murder. *See Washington v. Glucksberg*, 521 U.S. 702, 725 (1997); *Vacco v. Quill*, 521 U.S. 793, 807 (1997). While the United States Supreme Court has acknowledged that many states authorize a physician to provide "aggressive palliative care" to lessen a person's pain and suffering, even when such action may hasten death, *see Vacco*, 521 U.S. at 801-02, the Court has made a distinction between such conduct, which is intended to relieve pain, and the action of assisting a suicide, which is intended to cause death. *Id.* The Court has never extended the rights of privacy, liberty, or due process to the realm of suicide, assisted suicide, or euthanasia. Petitioner has not demonstrated that reasonable jurists would find the Court's procedural ruling on the Ninth Amendment claim debatable or wrong, nor has he made a substantial showing of the denial of a constitutional right concerning his Ninth and Fourteenth Amendment claims.

Additionally, Petitioner has not established that trial counsel was ineffective during the pre-trial period under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Petitioner cannot demonstrate that he was prejudiced by counsel's conduct in seeking dismissal of the assisted suicide charge as the trial court denied counsel's motion and the charge was dismissed by the prosecution. Petitioner has also not explained how counsel's qualifications or his relationship with Petitioner or co-counsel prejudiced the defense or affected the trial outcome. Lastly, Petitioner has not shown what more counsel could have or should have done to better prepare a defense or obtain a different result, particularly given the videotape evidence against him. He has

thus failed to make a substantial showing of the denial of a constitutional right concerning this claim.

As to the standby counsel issue, the record indicates that Petitioner voluntarily, knowingly and intelligently, and unequivocally waived his right to counsel and elected to represent himself during trial. *See Faretta v. California*, 422 U.S. 806, 819 (1975). Further, Petitioner's use of standby counsel did not transform his self-representation into representation with active participation by defense counsel. *See generally McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Nonetheless, even assuming that Petitioner was entitled to the effective assistance of standby counsel, he cannot establish that he was prejudiced by standby counsel's conduct under the standard set forth in Strickland, supra, given the significant evidence against him as well as his lack of recognized legal defenses to the second-degree murder charge. He has thus failed to make a substantial showing of the denial of a constitutional right concerning this claim.

Lastly, Petitioner's Fifth Amendment claim is barred by procedural default, and he has failed to establish cause and prejudice or that a fundamental miscarriage of justice has occurred. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The claim also lacks merit as Petitioner cannot establish that the prosecutor impermissibly commented on his failure to testify in violation of the Fifth Amendment. *See Griffin v. California*, 380 U.S. 609, 615 (1965); *Byrd v. Collins*, 209 F.3d 486, 533-34 (6th Cir. 2000). The prosecutor's comments were intended to prevent Petitioner from arguing facts not in evidence and from testifying without being subject to cross-examination. They were not made to encourage the jury to infer Petitioner's guilt from his decision not to testify. Furthermore, the comments were relatively isolated, the trial court gave an appropriate jury instruction, and the

prosecution presented significant evidence of guilt. Petitioner has thus failed to demonstrate that reasonable jurists would find the Court's procedural ruling debatable or wrong, and he has failed to make a substantial showing of the denial of a constitutional right concerning this claim.

Accordingly, for the reasons stated, the Court **DENIES** the application for a certificate of appealability.

IT IS SO ORDERED.

s/ Nancy G. Edmunds
Nancy G. Edmunds
UNITED STATES DISTRICT JUDGE

DATED: NOV 03 2003